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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1999

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ARTHUR CALDERON,

*Petitioner,*

v.

ANTHONY CORNELL BEAN,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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38 pp

(CAPITAL CASE)

## QUESTION PRESENTED

Does the Ninth Circuit opinion attempt to establish a higher standard than that announced in *Strickland* for reviewing the constitutional adequacy of counsel's performance in the penalty phase of a capital case? Has the Ninth Circuit substituted a requirement of flawless performance for the generally accepted standard of competent representation? Does the opinion overlook important facts relating to trial counsel's performance at the penalty phase and the fact that even if more could have been done, there was no prejudice in light of the record at trial? Secondly, in regard to the severance issue, does the opinion improperly disregard state court findings and determinations? Finally, this case presents an important question of federal law affecting the most basic aspects of federalism, with especially far-reaching impact on State death penalty judgments. By granting relief to a capitally convicted defendant whose state habeas was specifically rejected as untimely, has the District Court and the Ninth Circuit unconstitutionally violated the most sacred promise of federalism.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION OR JUDGMENT BELOW | 1 |
| STATEMENT OF JURISDICTION | 2 |
| CONSTITUTIONS, STATUTES OR REGULATIONS | 2 |
| STATEMENT OF THE CASE | 3 |
| a. State Proceedings | 3 |
| SUMMARY OF REASONS FOR GRANTING THE WRIT | 7 |
| ARGUMENT | 9 |
| **I. THE NINTH CIRCUIT'S HOLDING THAT THE TRIAL COURT IMPROPERLY DENIED BEAN'S MOTION FOR SEVERANCE FAILS TO PROVIDE DUE DEFERENCE TO THE STATE COURT FINDINGS AND IS AN AFFRONT TO FEDERALISM** | 9 |
| **II. THE NINTH CIRCUIT'S OPINION ADOPTS A NEW CONSTITUTIONAL TEST WHICH, IN EFFECT, REQUIRES THAT TRIAL COUNSEL PERFORM "FLAWLESSLY" IN ORDER TO MEET SIXTH AMENDMENT STANDARDS IN A DEATH PENALTY CASE** | 15 |

TABLE OF CONTENTS, CONT'D

**III. GRANTING HABEAS CORPUS RELIEF ON A CLAIM WHICH THE CALIFORNIA SUPREME COURT EXPRESSLY FOUND TO HAVE BEEN PROCEDURALLY BARRED AND UNTIMELY OFFENDS THE MOST BASIC PRINCIPLES OF COMITY AND FEDERALISM** 21

A. California's Well Established And Consistently Applied Timeliness Requirements Were Applicable To Petitions For Writ Of Habeas Corpus In Capital Cases Filed Prior To 1994 24

B. It Is Clear Constitutional Error To Assume That California's Timeliness Procedural Requirements Were Not Independent And Adequate State Procedural Bars To Federal Review 25

CONCLUSION 30

## TABLE OF AUTHORITIES


**Page**

**Cases**

*Beam v. Paskett*
3 F.3d 1301, 1306 (9th Cir. 1993) 27

*Bean v. Calderon*
163 F.3d 1073, 1086-1087 (9th Cir. 1998) 13, 15

*Calderon v. Bean*
520 U.S. 1204 (1997) 7

*Calderon v. United States District Court for the Eastern District of California (Bean)*
96 F.3d 1126 (9th Cir. 1996) 6

*Clarbourne v. Lewis*
64 F.3d 1373, 1383 (9th Cir. 1995) 18, 19

*Coleman v. Thompson*
501 U.S. 722, 731-732 (1991) 22

*Correll v. Stewart*
137 F.3d 1404 (9th Cir. 1998),
cert. denied __ U.S. __,
119 S.Ct. 450 (1998) 18

*Fearance v. Scott*
56 F.3d 633, 642 (5th Cir. 1995) 28

*Featherstone v. Estelle*
948 F.2d 1497, 1503 (9th Cir. 1991) 12

## TABLE OF AUTHORITIES, CONT'D

*Fields v. Calderon*
125 F.3d 757 (9th Cir. 1997) 26

*Ford v. Georgia*
498 U.S. 411, 424 (1991) 23, 28

*Harmon v. Ryan*
959 F.2d 1457, 1461 (9th Cir. 1992) 23

*Hendricks v. Calderon*
70 F.3d 1032 (9th Cir. 1995) 18

*Herring v. Meachum*
11 F.3d 374, 377-378 (2d Cir. 1993) 9, 12, 13

*Holins v. Department of Corrections State of Iowa*
969 F.2d 606, 608 (8th Cir. 1992) 11

*Holman v. Gilmore*
126 F.3d 876 (7th Cir. 1997) 16

*In re Clark*
5 Cal.4th 750 (1995) 4, 6, 22, 24-29

*In re Harris*
5 Cal.4th 813, 826 (1993) 5, 6, 24

*In re Stankewitz*
40 Cal.3d 391 (1985) 6, 24, 27, 28

*In re Walker*
10 Cal.3d 764, 774 (1974) 24

## TABLE OF AUTHORITIES, CONT'D

*In re Waltreus*
62 Cal.2d 218, 225 (1965) 5

*Johnson v. Mississippi*
486 U.S. 578, 587-589 (1988) 23

*Karis v. Vasquez*
828 F.Supp. 1449 (E.D.Cal. 1993) 25

*McKenna v. McDaniel*
65 F.3d 1483 (9th Cir. 1995) 26

*Morales v. Calderon*
85 F.3d 1387 (9th Cir. 1996) 26

*Moran v. McDaniel*
80 F.3d 1261, (9th Cir. 1996) 26

*NAACP v. Alabama ex rel. Flowers*
377 U.S. 288, 297 (1964) 23

*Odle v. Calderon*
884 F.Supp. 1404, 1415 (N.D. CA 1995) 14

*Paradis v. Arave*
954 F.2d 1483 (9th Cir. 1992) 25, 26

*Pearson v. Norris*
52 F.3d 740 (8th Cir. 1995) 28

*People v. Bean*
46 Cal.3d 919 (1988) 5, 9, 11, 13, 14, 16

## TABLE OF AUTHORITIES, CONT'D

*People v. Pope*
23 Cal.3d 412, 426 (1979) 16

*Pointer v. United States*
151 U.S. 396, 403-404 (1894) 11

*Prihoda v. McCaughtry*
910 F.2d 1379, 1383 (7th Cir. 1990) 23

*Siripongs v. Calderon*
35 F.3d 1308 (9th Cir. 1994),
cert. denied, 115 S.Ct. 1175 (1995) 25

*Smith v. Stewart*
140 F.3d 1263 (9th Cir. 1998) 17, 18

*Strickland v. Washington*
466 U.S. 668, 686 (1984) 15, 16, 18, 20

*Sumner v. Mata (Mata I)*
449 U.S. 539, 551-552 (1981) 16

*Tredway v. Farley*
35 F.3d 288, 292-295 (7th Cir. 1994) 29

*United States v. Bagley*
473 U.S. 667, 682 (1985) 11

*United States v. Johnson*
820 F.2d 1065 (9th Cir. 1987) 12-14

*United States v. Lane*
474 U.S. 438, 446, n. 8 (1986) 11

## TABLE OF AUTHORITIES, CONT'D

**Constitutional Provisions**

United States Constitution
Article VI, Clause 2 — 2

**Statutes**

Penal Code
§ 954 — 9, 10

**Court Rules**

CALJIC
No. 17.02 — 14

**Other Authorities**

28 U.S.C. section 636, subdivision (b)(1)(B) — 5
28 U.S.C. section 1254(1) — 2
28 U.S.C. section 2254 — 2

The Tenth Amendment of the
United States Constitution — 2

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1999

No.

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ARTHUR CALDERON,

*Petitioner*,

v.

ANTHONY CORNELL BEAN,

*Respondent*.

---

J.S. Woodford, Acting Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINION OR JUDGMENT BELOW

The opinion of the United State Court of Appeals for the Ninth Circuit is reported as 163 F.3d 1073 (9th Cir. 1998), affirming in part; reversing in part the judgment of the district court. A copy of that decision is attached hereto as appendix A . The order of the Court of Appeals, Ninth Circuit, that denied petitioner's petition for rehearing and suggestion for rehearing and suggestion for rehearing en banc is unreported and is reproduced and attached as Appendix B.

## STATEMENT OF JURISDICTION

The acting warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States court of Appeal for the Ninth Circuit was entered on December 15, 1998. The petition for rehearing was denied on March 2, 1999.

## CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or law of any state to the contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## STATEMENT OF THE CASE

### State Proceedings

On August 30, 1980, the Sacramento County District Attorney filed an information in the Superior Court accusing respondent Bean ("Bean") with the murder of Beth Schatz; assault with intent to commit murder; robbery; burglary; the murder of Eileen Fox; robbery; and burglary. The information further alleged that Bean used a deadly and dangerous weapon, and that Bean inflicted great bodily injury. Three special circumstances were alleged with respect to the murders, to wit: 1) that the murders were committed during the commission of a robbery; 2) that the murders were committed during the commission of a burglary; and 3) that both murders were of the first degree and that Bean stood convicted of multiple murder.

On June 8, 1981, the jury found Bean guilty of the first degree murder of Beth Schatz with the use of a dangerous and deadly weapon. With respect to this count, the jury also found true all three special circumstances. The jury also found Bean guilty of the first degree murder of Eileen Fox with a finding of three special circumstances. In addition, the jury found Bean guilty of two counts of robbery, one count of burglary in the first degree, one count of burglary in the second degree and one count of assault with a deadly weapon with great bodily injury.

On June 22, 1981, following the penalty phase of the trial, the jury found that the aggravating factors outweighed the mitigating factors and imposed the death penalty. CT 1021, 1023. The jury found that the mitigating factors outweighed the aggravating factors as to the Fox murder and accordingly imposed the penalty of

confinement in the state prison for life without the possibility of parole.

Bean was sentenced on July 20, 1981. For the murder of Beth Schatz, he received the death penalty. For the murder of Ellen Fox, he was sentenced to a term of life without the possibility of parole. This life term was ordered to be served consecutively to the seven year term he received for the other convictions, plus the enhancement.

Appeal to the California Supreme Court was automatic.

On September 19, 1988, the California Supreme Court affirmed Bean's convictions in all respects. The opinion affirming Bean's convictions and death penalty is published at 46 Cal.3d 919 (1988).

The petition for writ of certiorari which was filed on April 24, 1989, was denied on March 19, 1990.

On July 18, 1991, counsel appointed to represent Bean filed a federal petition for writ of habeas corpus.

On July 30, 1991, the State filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

On September 26, 1991, the District Court ordered that Bean exhaust all unexhausted claims and stayed his execution.

Three years after counsel was appointed by the California Supreme Court on October 31, 1991, Bean filed a petition for writ of habeas corpus.

On June 1, 1994, an informal response was filed.

Specifically citing *In re Clark*, 5 Cal.4th 750 (1995), the California Supreme Court on February 23, 1995, denied Bean's petition for writ of habeas corpus[1] and held that:

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1. Appendix C.

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which [Bean] lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in the investigating and presenting the claims.

The California Supreme Court *also* specifically addressed numerous issues as ". . . procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." *In re Harris*, 5 Cal.4th 813, 826 (1993); *In re Clark*, 5 Cal.4th 750, 765; *In re Waltreus*, 62 Cal.2d 218, 225 (1965). *See also*, *People v. Bean*, 46 Cal.3d 919 (1988).

Lastly, the California Supreme Court addressed several issues noting that they had ". . . been considered on their merits, *see In re Clark*, 5 Cal.4th 750, 797-798, but, in light of the record of the trial and related proceedings, failed to state a prima facie case entitling [Bean] to relief."

Bean filed an amended federal petition for writ of habeas corpus on or about March 22, 1995.

On July 21, 1995, the State filed a motion to dismiss Bean's amended petition urging that his contentions had been procedurally defaulted in state court as untimely. (Additionally, the State argued that specific claims were procedurally barred as articulated by the California Supreme Court above.)

On November 17, 1995, the magistrate judge, pursuant to a referral by the district court under 28 U.S.C. section 636, subdivision (b)(1)(B), filed Findings and Recommendations (hereinafter "F and R's"), wherein the magistrate judge denied the State's motion to dismiss 52 claims based on independent and adequate state procedural bars. A copy of these findings is attached hereto as Appendix D United States District Court

Findings and Recommendations and is incorporated by reference herein.

In his "F and R's," the magistrate judge refused to apply *Clark* or *Harris* to Bean's state habeas petition even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims, "i.e., within a reasonable time after the final date of *Stankewitz*[2/] [January 16, 1986], *Clark* was not the law." F&R p. 8, fn. omitted.

On March 29, 1996, the district court, over the State's objections, filed an order adopting the magistrate judge's Findings in their entirety and denying the State's motion to dismiss. Appendix E.

From May 20, 1996, through May 30, 1996, the parties conducted an evidentiary hearing before Magistrate Judge Gregory G. Hollows.

On July 18, 1996, the State filed a petition for writ of mandate and/or prohibition in the Ninth Circuit Court of Appeals. In an opinion filed on September 30, 1996, the court of appeals denied the petition. *Calderon v. United States District Court for the Eastern District of California (Bean)*, 96 F.3d 1126 (9th Cir. 1996). On November 26, 1996, the State's petition for rehearing was denied.

On January 23, 1997, the magistrate judge filed findings and recommendations recommending that a writ of habeas corpus issue for purposes of the penalty phase. The magistrate judge concluded *inter alia* that: as to claim XLIX, penalty phase counsels' representation was constitutionally substandard, and that petitioner was prejudiced by counsels' alleged incompetence, and; (2) as to Claim XXI, there was bailiff misconduct which was

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2. *In re Stankewitz*, 40 Cal.3d 391 (1985).

potentially prejudicial to petitioner in the penalty phase of the trial.

On April 28, 1997, this Court denied the State's petition for certiorari contesting the district court's application of the procedural bar. *Calderon v. Bean*, 520 U.S. 1204 (1997).

On June 30, 1997, Chief Judge William B. Shubb adopted the magistrate judge's findings except for the finding that bailiff misconduct resulted in prejudice to Bean at the penalty phase. Accordingly, Bean's petition for writ of habeas corpus as to the guilt phase was denied; Bean's petition for writ of habeas corpus as to the penalty was granted and the sentence of death was vacated.

Petitioner filed a timely notice of appeal in the United State Court of Appeals for the Ninth Circuit on August 20, 1997. Bean filed a notice of cross-appeal on August 27, 1997.

On December 15, 1998, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision as to Bean's conviction for the burglary, robbery, and murder of Eileen Fox. In all other respects, the court affirmed the district court's judgment.

Rehearing was denied on March 2, 1999.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the opinion of the United States Court of Appeal for the Ninth Circuit, filed December 15, 1998, overlooked or misapprehended particular points of law and fact. The opinion held that 1) defense counsel's performance at the penalty phase constituted inadequate assistance of counsel, and, 2) the trial court improperly denied Bean's motion for severance of the two counts joined for trial. The opinion affirmed the District Court's order granting relief from the death sentence and, additionally, reversed one of

the two murder convictions on the basis that it was improperly joined to a stronger case.

Petitioner seeks certiorari because both holdings conflict with and misapply Ninth Circuit authority. The opinion overlooks important facts relating to trial counsel's performance at the penalty phase and the fact that even if more could have been done, there was no prejudice in light of the record at trial. Additionally, in regard to the severance issue, the opinion essentially ignores state court findings and determinations.

This case presents an important question of federal law affecting the most basic aspects of federalism, with especially far-reaching impact on State death penalty judgments.

## ARGUMENT

### I.

### THE NINTH CIRCUIT'S HOLDING THAT THE TRIAL COURT IMPROPERLY DENIED BEAN'S MOTION FOR SEVERANCE FAILS TO PROVIDE DUE DEFERENCE TO THE STATE COURT FINDINGS AND IS AN AFFRONT TO FEDERALISM

Petitioner respectfully submits that, as correctly noted by the district court, Bean has not met his "onerous burden" of demonstrating that he was actually prejudiced by the joinder, so as to deprive him of a fair trial. *Herring v. Meachum*, 11 F.3d 374, 377-378 (2d Cir. 1993). The Ninth Circuit's finding that *Bean's* due process rights were violated is a clear error which only this Court can reverse.

The California Supreme Court concluded that the manner in which the Schatz and Fox homicides were committed were ". . . not sufficiently similar to reflect a common modus operandi." The court also concluded, however, ". . . it does not follow that denial of the [severance] motion was an abuse of discretion. Here, the State's interest in joinder was not outweighed by the potential of prejudice." *People v. Bean*, 46 Cal.3d 919, 935.

California Penal Code section 954 provides that a trial court may order severance in the trial of otherwise joinable offenses when it appears that separate trials are required in the interest of justice. This provision reflects an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guarantee of due process.

The California Supreme Court concluded that the evidence of the Schatz and Fox homicides was not "cross-admissible" and discussed whether the trial court abused its discretion in denying the motion for severance.

The Court noted that the evidence in question entirely involved *charged offenses,* i.e., the Fox and Schatz homicides, rather than evidence of *uncharged offenses.* "The prosecution is entitled to join offenses under the circumstances specified in section 954. The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that charges be separately tried." Citation deleted; *Id.* at 938.

The court concluded that Bean failed to demonstrate that the trial court's denial of severance was an abuse of discretion. The California Supreme Court concluded that:

> . . . neither offense was particularly inflammatory in comparison with the other. There was substantial evidence of defendant's involvement in each. His own admissions implicated him in the Schatz offenses, and his fingerprint on the sunglasses found near the body of Eileen Fox strongly implied his involvement in her murder. It did not appear reasonably likely, therefore, that the jury would be influenced in determining the defendant's guilt of either group of offenses by knowledge of the other.

*Id.* at 939.

The California Supreme Court also noted the significant benefits to the prosecution of joint trials, i.e., the conservation of judicial resources and public funds, requirement of only a single courtroom, judge, court attaches, one group of jurors, and the reduced delay on disposition of criminal charges both in trial and through the appellate process. "These considerations outweigh the minimal likelihood of prejudice through joinder of the charges in this case. Denial of severance, therefore, was not an abuse of discretion." *Id.* at 939-940.

Citing *Pointer v. United States,* 151 U.S. 396, 403-404 (1894), the California Supreme Court concluded its analysis by determining the "actual impact at trial of the joinder" and by rejecting any claim of spillover:

> . . . we find neither actual nor potential prejudice such as to render the trial grossly unfair and thus denying due process. Although at trial the reliability of the fingerprint evidence in the Fox murder was disputed, other evidence pointed to defendant as the perpetrator. His contradictory explanation of his ownership of those or similar sunglasses; his presence in the neighborhood when he was seen possibly 'casing' the home; his familiarity with the route to the Florin Meadows Apartment from the location at which the victim's car and wallet were abandoned, as well as fingerprint evidence was sufficiently persuasive evidence of his guilt that it is not reasonable probable that the jury was influenced in its verdict of guilt of the Fox crimes by its knowledge of his involvement in the Schatz offenses.

*People v. Bean,* 46 Cal.3d 919, 940, citing *United States v. Bagley,* 473 U.S. 667, 682 (1985).

Petitioner respectfully submits that it is well established that when severance is raised as an issue on federal habeas corpus, Bean's burden is extremely heavy and misjoinder must render the trial fundamentally unfair to amount to a constitutional violation. *Holins v. Department of Corrections, State of Iowa,* 969 F.2d 606, 608 (8th Cir. 1992). In this regard, *United States v. Lane*, 474 U.S. 438, 446, n. 8 (1986) recites that "[I]mproper joinder does not, in itself, violate the constitution. Rather, misjoinder . . . rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny

a defendant his . . . right to a fair trial." Thus, joinder is a problem only if it actually renders a state trial unfair in violation of due process. *Herring v. Meachum*, 11 F.3d 374. The Ninth Circuit in *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991) limiting instructions can adequately deal with the possible charges of carryover and a presumption of fidelity and legality attaches to state criminal proceedings. *Id.* at p. 378.

Neither the potential for prejudice nor even a high probability of prejudice will suffice in establishing whether consolidation violated due process; Bean must establish that prejudice actually resulted "from the events as they unfolded during the joint trial." *Herring v. Meachum*, 11 F.3d 374, 377, 378. The Second Circuit clearly articulated the procedural posture for habeas corpus review of this issue:

> [H]abeas petitioners challenging their state convictions under the general fairness mandate of the due process clause bear an onerous burden. Because of the significant procedural protection provided by direct review through the state system, we will not lightly conclude that state court proceedings were so arbitrary as to violate due process.

The Ninth Circuit has not directly addressed this issue in a habeas case. In *United States v. Johnson*, 820 F.2d 1065 (9th Cir. 1987) a direct review case, however, the Ninth Circuit noted in dictum that:

> Even if the evidence would not have been admissible, the district court did not abuse its discretion because the jury was not likely in this case to confuse which count particular evidence was introduced to establish. What evidence concerning the other crime is limited or not admissible, our primary concern is whether the

> jury can reasonably be expected to 'compartmentalize the evidence' so that evidence of one crime does not taint the jury's consideration of the other crime.

*Id.* 1071.

The court elaborated further, "[E]ven where evidence of one of the crimes is particularly weak, . . . we consider [] whether the jury was likely to have been confused." *Id.* 1071 n. 6, citations omitted. The fundamental constitutional issue is therefore, whether the jury was reasonably able to distinguish evidence introduced in one case from evidence introduced in the other.

The California Supreme Court determined that the evidence against Bean was sufficient on both counts and that "no spillover effect of the evidence occurred." *People v. Bean*, 46 Cal.3d 919, 940. The evidence introduced for both the Fox offense and the Schatz offense was simple and distinct, making it likely that the jury was able to keep the evidence separate when considering the various counts against Bean. *See Herring v. Meachum*, 11 F.3d 374, 378 ("moreover, because the evidence with respect to each murder was distinct and easily compartmentalized, the risk of jury confusion at petitioner's trial was significantly limited").

Significantly, the Ninth Circuit found that the evidence adduced at Bean's original trial ". . . was sufficient for a rational fact finder to find Bean guilty beyond a reasonable doubt. . ." of the Fox offenses. *Bean v. Calderon*, 163 F.3d 1073, 1086-1087 (9th Cir. 1998).

The evidence used to prove such distinctly distinguishable crimes is unlikely to have confused the jury. The Ninth Circuit is apparently concerned that the jury would have been confused as to which crime the instructions regarding aiding and abetting and conspiracy

applied. Petitioner respectfully disagrees. Without question, a jury would be able to realize that instructions regarding aiding and abetting or conspiracy apply to the offense involving multiple assailants and not to the crime involving a single assailant. The Ninth Circuit also suggests that acquittal as to one of the counts would have established that the jury had compartmentalized the evidence. The Ninth Circuit has in fact determined that there is sufficient evidence to convict the accused on both counts. The jury in fact brought separate verdicts for the two murders and determined that Bean should be sentenced to death for the Schatz's murder and be in prison for life for the Fox murder.

Citing *United States v. Johnson*, 820 F.2d 1065, 1071, the Ninth Circuit opines that a jury can only compartmentalize the evidence if properly instructed to do so by the court. In *Johnson* the jury instruction found to be sufficient was "[E]ach count charges a separate crime. You must decide separately what the evidence in the case shows about the crime." *Id.* 1071. In the instant case, the trial court specifically charged the jury to separately consider each count. ". . . each count charges a distinct offense. You must decide each count separately. The defendant may be found guilty or not guilty of any or all the crimes charged. Your finding on each count must be stated in a separate verdict." CALJIC No. 17.02, CT 883, RT 3818; *see Odle v. Calderon*, 884 F.Supp. 1404, 1415 (N.D. CA 1995).

Lastly, as noted by the district court, "the California Supreme Court, in addressing the joinder issue, found 'neither actual nor potential prejudice,' a more stringent standard than that required by the Fourteenth Amendment." *Citing, People* v. *Bean*, 46 Cal.3d 919, 940.

## II.

### THE NINTH CIRCUIT'S OPINION ADOPTS A NEW CONSTITUTIONAL TEST WHICH, IN EFFECT, REQUIRES THAT TRIAL COUNSEL PERFORM "FLAWLESSLY" IN ORDER TO MEET SIXTH AMENDMENT STANDARDS IN A DEATH PENALTY CASE

Petitioner acknowledges that Bean's representation at the penalty phase was not "flawless." However, it is also clear that counsel's performance did not "so [undermine] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

This Court has set a standard which has been characterized as "low" for counsel to qualify as effective because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] is simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689.

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") concurred with the findings of the district court and a magistrate judge and determined that the representation Bean received at the penalty phase was constitutionally inadequate. The Ninth Circuit found that "Bean's penalty-phase defense was disorganized and cursory. . . . The two attorneys' confusion over they respective roles exacerbated deficiencies in the development of mitigating evidence." *Bean v. Calderon*, 163 F.3d 1073, 1078.

Petitioner respectfully submits that the Ninth Circuit has in fact employed a new test for reviewing the constitutional competency of counsel which now requires a showing that the attorney performed flawlessly, especially during the penalty phase of a capital case. The

California Supreme Court unanimously referenced the same strategic and tactical decisions made by trial counsel which were at issue in the federal proceedings and was ultimately satisfied that trial counsels' performance met the constitutional standard as set forth in *People v. Pope,* 23 Cal.3d 412, 426 (1979), *People v. Bean*, 46 Cal.3d 919, 944 (1988). *See Strickland v. Washington*, 466 U.S. 668.

It is a well established principle of collateral review that when a state court applies established constitutional law, its decision must be respected and presumed correct. *Sumner v. Mata (Mata I),* 449 U.S. 539, 551-552 (1981); *Strickland v. Washington*, 466 U.S. 668 calls for an inquiry into degree: ". . . it is a balancing rather than a bright-line approach, just like the question about confrontation rights. . . This means that only a clear error in applying *Strickland* standard would support a writ of habeas corpus." *Holman v. Gilmore*, 126 F.3d 876 (7th Cir. 1997). (Citations deleted.)

Petitioner respectfully submits that in the instant case, the Ninth Circuit's opinion fails to afford the California Supreme Court's decision due deference, i.e., the majority opinion appears to be little more than a de novo concerning the way trial counsel presumably should have handled the defense. The opinion fails to address the question posed by *Strickland* ". . . whether taking all of the proceedings into account, counsel made 'the adversarial testing process' work in the particular case." *Holman v. Gilmore*, 126 F.3d 876, 882, citing *Strickland v. Washington*, 466 U.S. at 690.

At the penalty phase, Bean's counsel presented nine witnesses, taking up more than 200 pages of witness testimony. These witnesses included two psychiatric experts, Dr. Weissman and Dr. Blunt, who also testified at the 1996 evidentiary hearing. At trial, Dr. Blunt testified that, after performing five neurological tests, she was convinced that Bean was organically brain damaged from three lesions on the brain. This brain damage, Blunt

testified, involved an inability to think, to form judgments, to plan or to appreciate the criminality of conduct. Dr. Weissman testified that he had used six different tests on Bean and discovered that Bean was suffering from organic personality disorder and mental retardation (Bean had the mental age of an 8 to 11 year old in terms of "thinking" and "capacity to understand his environment"). Dr. Weissman testified that although he had reached no firm conclusion, he determined that Bean had "soft signs" of "potentially mild to moderate degree of organic . . . brain damage." Contrary to the Ninth Circuit's conclusion, counsel's presentation of the two psychiatric witnesses did not constitute a "failure to elicit mitigating testimony from mental health experts."

Petitioner does not dispute the fact that in 1981 Bean's trial counsel *could* have presented Bean's mitigating evidence in greater and more compelling detail, i.e., as adduced years later at the 1996 evidentiary hearing.

Petitioner respectfully submits that the Ninth Circuit's opinion fails to focus on whether Bean's penalty phase counsel was constitutionally competent, a much lower standard than the seamless presentation the Ninth Circuit now suggests should have been made.

The instant case is in marked contrast from other recent cases in which the Ninth Circuit has held that counsel was constitutionally deficient during the penalty phase. In *Smith v. Stewart*, 140 F.3d 1263 (9th Cir. 1998) cert. den. __ U.S. __ 119 S.Ct. 336 1998, the Ninth Circuit held that trial counsel provided ineffective assistance because counsel "provided no evidence at the penalty phase and virtually no argument" despite the fact that evidence of mitigating circumstances "was rather near the surface." *Id.* at 1269. Counsel's only argument involved "a few asthenic comments to the effect that Smith still denied his guilt and that he was just 30 years of age. Nothing else!" *Id.* at 1263.

In *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998), cert. denied __ U.S. __, 119 S.Ct. 450 (1998), counsel failed to present any evidence of petitioner's purported mental illness as a mitigating factor. Defense counsel's argument at the sentencing hearing took a total of eight transcript pages. The Ninth Circuit held that "[T]his almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence, including evidence of Correll's psychiatric history and his condition at the time of the murders, constitutes deficient performance 'outside the wide range of professionally, competent assistance.'" *Id.* at 1412. Quoting *Strickland*, 466 U.S. at 690. Additionally, defense counsel met with his client for just five minutes in the month between the jury verdict and the pre-sentencing hearing.

Likewise, in *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995) counsel failed to conduct any investigation into mitigating evidence without a strategic rationale to justify the lack of preparation. *See id*, at 1043. In *Clarbourne v. Lewis*, 64 F.3d 1373, 1383 (9th Cir. 1995) counsel "did not call any witnesses, introduce any evidence of Clarbourne's history of mental illness, or argue any mitigating circumstances beside Clarbourne's mental condition at the time of the offense." *Id.* at 1384. Clarbourne's entire mitigation argument took up six pages of the sentencing hearing transcript. The Ninth Circuit held that "the total absence of advocacy [fell] outside *Strickland*'s 'wide range of professionally competent assistance,' and that counsel's representation at the sentencing hearing 'amount[ed] in every respect to no representation at all.' *Id.* 1387. (Citations and internal quotation marks omitted.)"

The instant case stands in stark contrast to the above referenced Ninth Circuit cases. Bean's penalty phase counsel was not derelict relative to these cases. In *Smith*, *Correll*, *Hendricks*, and *Clarbourne* counsel generally

conducted no investigations, presented no mitigating evidence, made no arguments on behalf of their clients and brought virtually no witnesses to the stand. In contrast, Bean's penalty phase counsel offered mitigating evidence to demonstrate Bean's background information and mental deficiencies and thereupon made reasonable arguments on Bean's behalf. Although it would have been preferable for counsel to have presented the plethora of information adduced at the 1996 evidentiary hearing, the United States Constitution does not demand this. Bean's penalty phase counsel was not guilty of a "total absence of advocacy" amounting to no representation at all. *Clarbourne v. Lewis*, 64 F.3d 1373, 1387.

As petitioner has consistently argued, Bean's trial counsel had his investigator contact and interview various family members and friends of Bean in order to develop a penalty phase defense strategy. However, as trial counsel noted at the evidentiary hearing conducted in 1996, Bean and his family simply did not disclose to counsel and his investigator the kind and quantum of information that has been developed in the 17 years this case languished after his state trial. Bean and his family were tacitly and overtly uncooperative and thereby failed to disclose the type of information that would have been helpful in developing a mental health profile. What is most notable about trial counsel's investigator's reports is what the family members and friends did not relate, viz. Bean's alleged chronic use of controlled substances, his head injuries as a child, his mother's habitual ingestion of alcoholic beverages, the regular beatings and tauntings of Bean by his father, and Bean's general inability to cope. Moreover, with the additional neuro-psychological testing that was conducted between the rendition of the guilt verdicts and the commencement of the penalty phase, penalty phase counsel obtained additional information of Bean's background and character.

The issue is not whether federal counsel can find mitigating evidence not discovered by trial counsel, such will always be the case. The issue is whether defense counsel at trial provided constitutionally adequate representation by investigating the possible mitigating evidence reasonably available to him *at that time*. Accordingly, petitioner respectfully submits that Bean does not satisfy the first prong of the real *Strickland* test.

Furthermore, under the second prong of the *Strickland* test, it is unlikely that, had the more detailed evidence now available regarding Bean's background and mental health been presented to the jury, the outcome of the trial would have changed. The jury was exposed to a majority of the evidence the Ninth Circuit now points to as mitigating factors. Without question, several graphic details of Bean's childhood were not shared with the jury. The jury was aware, however, that Bean spent time in juvenile detention, was beaten by his parents, and left home at 15. Similarly, while a jury did not hear all the possible evidence of Bean's mental deficiencies, the jury was exposed to two psychiatric experts testifying as to Bean's brain damage. The additional details discussed by the Ninth Circuit do not sufficiently change the overall picture of Bean's condition and history such that there is a reasonable probability that the outcome of the sentencing hearing would be different.

Petitioner submits that the fact that the jury opted not to recommend Bean be sentenced to death for both homicides, refutes the argument that Bean was prejudiced by allegedly substandard performance of defense counsel in the penalty phase. The more reasonable interpretation of these disparate verdicts is that the jury, having heard evidence of the brutality and callousness of the Schatz robbery-burglary-murder determined that the only appropriate punishment for this kind of criminal conduct was death, irrespective of Bean's mental impairments.

## III.

## GRANTING HABEAS CORPUS RELIEF ON A CLAIM WHICH THE CALIFORNIA SUPREME COURT EXPRESSLY FOUND TO HAVE BEEN PROCEDURALLY BARRED AND UNTIMELY OFFENDS THE MOST BASIC PRINCIPLES OF COMITY AND FEDERALISM

The claim upon which the District Court ultimately granted relief had been expressly found to be both procedurally barred and untimely presented by the California Supreme Court.

The final question presented in this case is extremely important since the Federal court's refusal to recognize the California Supreme Court's express application of its timeliness procedural bar to Bean's claims is a direct affront to the dignity of the fragile relationship between federal and state governments. This structural injustice offends the most basic principles of comity and federalism. This ruling has already had profound and unjust consequences on the recognition of California's procedural rules. California's procedural rules are entitled to both respect and cannot be brushed aside lightly by either the Ninth Circuit or District Court.

A manifest injustice has now resulted from the Ninth Circuit's refusal to honor California's express procedural bar finding as to claim XLIX of the state habeas petition since relief has been granted as to this claim. A defendant who was lawfully sentenced to death and who violated California's procedural rules by failing to file a timely habeas corpus petition has been rewarded by the federal courts with habeas corpus relief.

As a result of the District Court and Ninth Circuit's decisions, the State was forced to litigate numerous untimely claims in federal court, many of which

contain a number of subissues, which were properly procedurally barred by the state court. In addition, the state was forced to litigate claims in this case which were also procedurally defaulted under state law since they could have been, but unjustifiably were not, raised on appeal. Accordingly, the state's authority to mandate that state prisoners comply with its valid procedural requirements has not only been unjustifiably compromised, but now, relief has been granted on a claim which was not properly before the federal court because it had not been timely presented to the state court. This unnecessary litigation and the erroneous granting of relief are contrary to the weighty state interest in the finality of its judgment and enforcement of its laws. Unless this Court now boldly steps forward to recognize the validity of California's rules of procedural bar prior to *Clark*, the numerous California capital cases in federal court will all be subject to this unnecessarily protracted litigation and relief may again be granted on claims which can not properly be presented to a federal court.

Pursuant to the compelling mandates of comity and federalism, federal courts generally will not review the merits of a claim in a petition for writ of habeas corpus if the state courts denied the claim on state procedural grounds that are both independent of federal law and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). The standard has been stated as follows:

> A procedural default is not "independent" if, for example, the state procedural bar depends upon an antecedent determination of federal law. Similarly, the procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails

> to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

*Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992).

Courts have also observed that "[n]ovel procedural requirements or those of whose existence the defendant could not reasonably be deemed to have been apprised, cannot be permitted to thwart review. . . ." *NAACP v. Alabama, ex rel. Flowers*, 377 U.S. 288, 297 (1964). Similarly, another federal court observed that "[a] state ground is adequate only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or improperly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990), citing *Johnson v. Mississippi*, 486 U.S. 578, 587-589 (1988). Indeed, this very Court has also held that, before a state procedural rule can be considered adequate and independent to bar federal court consideration, the rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). Neither the Ninth Circuit nor the District Court may callously disregard California's well-established procedural bars. Since California's procedural bars have never been shown to have been applied infrequently, unexpectedly, or improperly, it was clear constitutional error to grant relief on a claim which the California Supreme Court rejected as untimely.

## A. California's Well Established And Consistently Applied Timeliness Requirements Were Applicable To Petitions For Writ Of Habeas Corpus In Capital Cases Filed Prior To 1994

California courts have consistently held that a state habeas petitioner must assert all claims known to him in a timely manner and that a petitioner must fully explain and justify any substantial delay in asserting known claims. *In re Clark*; *In re Stankewitz*, 40 Cal.3d 391, 396, n. 1; *In re Walker*, 10 Cal.3d 764, 774 (1974).

In June of 1989, the California Supreme Court published a detailed set of guidelines pertaining to the timeliness requirements applicable to state habeas petitioners in capital cases, entitled "Supreme Court Policies Regarding Cases Arising From Judgments of Death," (hereinafter "the Policies"). Attached hereto as Appendix E.

These standards which by then had been in effect for five years were in place on June 1, 1994, at the time Bean filed his first and only state petition for writ of habeas corpus. Counsel also knew that these standards applied in 1989 to Bean's application for collateral review, and in 1994, counsel sought to explain the 13 year delay in the filing of these clearly untimely claims when the state habeas petition was filed. The language of these standards clearly indicate their applicability to Bean's case while it was still active in the state courts.

Both the District Court and the Ninth Circuit's denial of the State's request for an extraordinary writ have taken the position that Bean's procedural default must be examined at the time it occurred. Fair enough. However, according to the Ninth Circuit, the default occurred at some nebulous time prior to the California Supreme Court's 1993 decisions in *Clark* and *Harris* when Bean consciously gambled that under California law he could file a grossly out of time petition without penalty. This

was never the law in California and in actuality, Bean defaulted all of his claims when he waited until June 1, 1994, to file an untimely petition without adequate justification for the delay.

**B. It Is Clear Constitutional Error To Assume That California's Timeliness Procedural Requirements Were Not Independent And Adequate State Procedural Bars To Federal Review**

In the instant case, Claim XLIX of Bean's 1994 Petition for Writ of Habeas Corpus was rejected by the California Supreme Court on the procedural grounds of being untimely. Thus far, both the District Court and the Ninth Circuit have concluded that the procedural bars relied upon by the California Supreme Court were not "adequate" to preclude federal review, especially in light of the California Supreme Court's decision in *In re Clark* at 750. It has been reasoned that, prior to *Clark*, California courts had not consistently applied *any* procedural bar in a consistent way, citing *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), cert. denied, 115 S.Ct. 1175 (1995) and *Karis v. Vasquez*, 828 F.Supp. 1449 (E.D.Cal. 1993), and that to apply the timeliness bar to Bean in the instant case would be an unfair retroactive application of the allegedly stricter timeliness standards articulated in *Clark*.

The crux of this error is that the court's which have thus far considered this question have blurred the distinction between the California Supreme Court's analysis in *Clark* with respect to the successive petitions procedural bar and that of the timeliness procedural bar. It was recognized in *Paradis v. Arave*, 954 F.2d 1483 (9th Cir. 1992) that, in evaluating the adequacy of state procedural bars, federal courts must focus on the

particular procedural bar invoked in the case at hand. The fact that one particular state procedural bar may be subject to attack on the ground it has been inconsistently or irregularly applied does not justify the inference that a different state procedural bar has been inconsistently or irregularly applied. *Id.* at 1493; see *Moran v. McDaniel*, 80 F.3d 1261, (9th Cir. 1996) [upholding Nevada's untimeliness procedural bar while distinguishing *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), which found another Nevada bar based on a failure to object at trial inadequate to forestall federal review]. Disregarding *Paradis*, both the Ninth Circuit and the District Court in the instant case inferred from the admission in the *Clark* opinion that previously the successive petitions procedural bar had not been regularly and consistently applied in California that this same inconsistency applied equally to California's application of the timeliness procedural bar. Such an inference is erroneous as the histories of the two procedural bars, successive petitions and timeliness, are quite different. More importantly, nothing in *Clark* suggests that the California courts have not regularly or consistently applied the timeliness procedural bar, nor has it ever been *proven* otherwise.[3]

Any determination of the adequacy of California procedural bars requires an honest examination of the *Clark* decision in which the California Supreme Court thoroughly analyzed the applicability of several state procedural bars to petitions for writ of habeas corpus. The California Supreme Court examined, separately, both the successive petitions bar and the timeliness bar. *In re Clark* at 767-782.

The federal courts have eagerly adopted and used to support their view that the decision in *Clark*

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3. See *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996) and *Fields v. Calderon*, 125 F.3d 757 (9th Cir. 1997).

signalled a drastic change in California's timeliness standards. *Id.* at 768.

However, such reliance ignores the fact that this language is found in the section of the state court opinion entitled "Repetitious and piecemeal claims" (*In re Clark* at 767). Thus far, a deaf ear has been turned to the California Supreme Court's assertions under the separate section entitled "Delay." Where the California Supreme Court observed, "Our decisions have *consistently required* that a petitioner explain and justify any substantial delay in presenting a claim. [Citation omitted; emphasis added.]" *In re Clark* at 783. If the California Supreme Court's admission of inconsistent application of the bar against successive petitions prior to *Clark* is to be readily accepted without question or analysis, the California Supreme Court's express assertion of a consistent requirement that substantially delayed claims have had to be justified must be given equal force. The District Court must presume that the California Supreme Court "has carried out its [state law] obligations even when it does not expressly indicate in its opinion that it has done so." *Beam v. Paskett*, 3 F.3d 1301, 1306 (9th Cir. 1993).

In rejecting the petitioner's argument in *Clark* that the Policies should not apply to him, the California Supreme Court observed, contrary to the District Court here, that:

> Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed *was on notice* that any substantial delay in filing a petition after the grounds became known had to be justified. *In re Stankewitz* at 396, fn. 1.

Emphasis added; *id.* at 782.

Moreover, California's highest court did not suggest that its 1989 Policies, or its decision in *Clark*, altered that court's longstanding approach to its timeliness bar. The

Policies merely set forth a presumption of timeliness and referred directly to *Stankewitz*, as the appropriate well defined standard for assessing timeliness. *In re Clark* at 783. Consequently, the court rejected an argument that the Policies changed any preexisting timeliness requirements. *Id.* at 785.

Thus, contrary to the Ninth Circuit and District Court opinions, the California Supreme Court's holding in *Clark* did *not* indicate that its prior holdings with respect to the timeliness bar were inconsistently applied. And, importantly in the instant case, the California courts have always required that a state habeas petitioner justify any substantial delay in filing a habeas petition. Bean knew this since he made an extensive but unsuccessful attempt in his habeas petition to justify the delay in presenting his new claims. The California Supreme Court made a specific finding that he failed as to all 52 of these claims.

This case is unlike that of *Ford v. Georgia* at 411. In *Ford*, the Georgia Supreme Court changed the specific period in which a criminal defendant could challenge his jury selection/composition and preserve the issue for review to a time past that in which that petitioner could have complied. *Id.* at 422.

Unlike the defendant in *Ford*, Bean was not absolutely deprived of his day in court in that he was given the opportunity to justify the substantial delay in presenting his unexhausted issues to the state high court. Nor was the requirement of justification, whatever its form, a novel or unexpected rule applied without notice at a time when Bean could not comply. *See, e.g., Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) [no problem of retroactivity noted where state court dismissed petitioner's third state petition, which, in that subsequent petition, cited no "cause" for raising claim that existed at time of first writ, even though the state court had not in the past regularly and strictly applied its abuse of the writ rules]; *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995); also

*Tredway v. Farley*, 35 F.3d 288, 292-295 (7th Cir. 1994). Without a showing by Bean of adequate justification, the California Supreme Court followed its well established rule that such petitions be summarily denied. *In re Clark* at 797. Because California's timeliness requirements for capital habeas petitions were well-established and consistently applied in 1994 at the time Bean unsuccessfully attempted to make such a showing, a mortal and wholly unnecessary blow has been struck to the basic precepts of comity and federalism. Here, California's timeliness procedural bar has been erroneously held not to be an adequate state rule to foreclose federal review of the 52 issues belatedly raised by Bean in his state habeas petition and relief has now been granted on one of these defaulted claims, allowing Bean to escape the death penalty.

## CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: May 27, 1999.

Respectfully submitted,

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COPY

Supreme Court, U.S.
FILED

No. 98 1931 MAY 28 1999

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

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ARTHUR CALDERON,

*Petitioner*,

v.

ANTHONY CORNELL BEAN,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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# APPENDIX

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6788

## TABLE OF APPENDICES


| Document | Appendix |
|---|---|
| United States Court Of Appeals For The Ninth Circuit Opinion | A |
| United States Court Of Appeals For The Ninth Circuit Order | B |
| Supreme Court Of California Order To Show Cause | C |
| Findings And Recommendations By Magistrate Judge Hollows Filed November 17, 1995, Which Denied The State's Motion To Dismiss 52 Claims Based On An Independent And Adequate Procedural Bar | D |
| California Supreme Court Policies Regarding Cases Arising From Judgments Of Death | E |

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| ANTHONY CORNELL BEAN<br>Petitioner-Appellee/<br>Cross-Appellant, | Nos. 97-99023<br>97-99024 |
| v. | D.C. No.<br>CV-S-90-0648 WBS |
| ARTHUR CALDERON, WARDEN,<br>Respondent-Appellant/<br>Cross-Appellee. | GGH<br><br>OPINION |

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
June 25, 1998--San Francisco, California

Filed December 15, 1998

Before: William C. Canby, Diarmuid F. O'Scannlain, and
Sidney R. Thomas, Circuit Judges

Opinion by Judge Sidney R. Thomas; Partial Concurrence
and Partial Dissent by Judge O'Scannlain

## SUMMARY

**Criminal Law and Procedure/Capital Cases**

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that a capital defendant receives ineffective assistance of counsel when defense attorneys failed to provide necessary information to unprepared

experts, or to conduct recommended mental-health testing before the eve of the penalty trial.

George Schatz awoke to find two strange men in his bedroom. He lost consciousness after they ordered him to lie immobile in his bed. When he awoke, Schatz found his wife dead, the victim of head wounds. Various items were missing from the Schatzes' home. Police recovered their stolen car a few miles away.

Three days later, police responding to a neighbor's call found Ellen Fox dead in her Sacramento residence. She died from a heart attack after being beaten with a blunt object. The next day, Fox's car was found a short distance from her house. Her purse was in it, and her wallet was nearby.

Tips led police to investigate a possible connection between appellee Anthony Bean and the Schatz and Fox crimes.

Cecelia Anders gave a statement to police. She asserted that Bean and Michael Hamilton had visited her on the morning of the Schatz crimes, and that Bean had stated that he probably had killed a woman that night. According to Anders, Bean also admitted that he had stolen specific property, accurately described the crime scene, and correctly indicated the location of the stolen Schatz vehicle. Norman Hamilton, Michael's brother and the father of Anders' child, also provided the police with a statement.

Bean was charged with two counts of first-degree murder with robbery, burglary, and multiple-murder special circumstances. The trial court twice denied defense motions to sever the Schatz and Fox charges on the grounds that the evidence was not cross-admissible, and the relatively stronger Schatz evidence would impermissibly bolster the much weaker evidence of Bean's guilt in the Fox case.

The evidence connecting Bean to the Schatz crimes included his undisputed fingerprint on a window screen; an undisputed partial palmprint on the counter; shoe imprints matching shoes he shared with his brother; and the extremely inculpatory statements he made to Norman Hamilton and Anders.

The sole direct evidence of Bean's complicity in the Fox offenses involved a vigorously challenged fingerprint on a pair of broken sunglasses found near Fox's body; Bean's ambiguous and contradictory statements regarding ownership of similar sunglasses; testimony of a neighbor that Bean had been in Fox's neighborhood on three occasions, including one when he was hiding in bushes

across from Fox's residence' the presence of a hair on sunglasses that was consistent with Bean's hair; and Bean's familiarity with the area where Fox's stolen property had been discarded.

In light of Bean's assertion that he had not been at the Schatz residence at the time of the crimes, his reluctance to blame Michael Hamilton, and his refusal to adopt a diminished capacity defense, appointed counsel Thomas Roehr presented an alibi defense. A jury convicted Bean as charged.

During the penalty phase, attorney Harold Machen served with Roehr. During the six weeks before trial, Machen engaged in no preparation and investigated no issues. Instead, he relied entirely on information Roehr had gathered regarding a possible competency defense. Roehr apparently believed that the trial court had barred him from participating in any aspect of the penalty phase except for argument.

Roehr contacted mental-health experts on Bean's mental state. Both recommended further neuropsychological tests. No tests occurred until Dr. Blunt performed them the weekend immediately preceding the penalty phase. Neither Machen nor Roehr were aware of the results when the penalty phase began. The experts received virtually none of the information the requested regarding Bean's background until that time (e.g., severe childhood physical abuse; delayed development; education as a mentally retarded person), and had very little trial preparation.

The jury returned a death verdict for the Schatz murder, and a verdict of life without the possibility of parole for the Fox killing.

After exhausting his state-court remedies, Bean sought federal habeas corpus relief. Following an evidentiary hearing, the district court vacated Bean's death sentence on the ground that defense counsel had provided ineffective assistance during the penalty phase. The court denied relief as to the guilt phase. Both sides appealed.

**[1]** To establish ineffectiveness of counsel, Bean had to demonstrate that his counsel's performance at the penalty phase was deficient, and that the deficient performance prejudiced his defense.

**[2]** Bean's penalty-phase defense was disorganized and cursory. **[3]** The two attorneys' confusion over their roles exacerbated deficiencies in the development of mitigating evidence. **[4]** In addition to delaying in following the recommendations of

two mental-health experts, Bean's counsel failed to furnish other necessary information to the experts who testified during the penalty phase, and failed to prepare the experts adequately for their testimony.

**[5]** In contrast, Bean's counsel at the evidentiary hearing presented abundant new mental-health evidence showing that Bean was mentally retarded; suffered from post-traumatic stress disorder; was brain-damaged; drug usage precluded him from forming the intent to kill, rob, or burglarize; and was incompetent to stand trial. **[6]** None of the conclusions reached by experts testified at the federal habeas hearing were unavailable to trial counsel.

**[7]** Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel.

**[8]** Although some mitigating evidence was presented, the representation in this case fell below an objective standard of reasonableness. When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty-phase assistance counsel. The collective failure to develop a penalty phase presentation could be characterized only as a deficiency in trial preparation, not a strategic decision.

**[9]** Ineffective assistance must be evaluated from counsel's perspective at the time. However, the ineffectiveness in this case resulted from inadequacies in rudimentary trial preparation and presentation. **[10]** Bean did not receive effective assistance of counsel at the penalty phase of his trial.

**[11]** Although Roehr and Machen elicited the testimony of the experts, the experts' lack of preparation and the limited information foundation for their conclusions severely undercut their utility to Bean's penalty-phase defense. **[12]** The jury had no knowledge of the sadistic treatment Bean received as a child. Along with other potentially mitigating factors, his developmental delays were reported to the jury only in the vaguest of terms.

**[13]** This was not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances. The prosecution presented scant evidence of aggravating factors. It was noteworthy that the jury was initially divided over the appropriateness of the death penalty. **[14]** These considerations undermined confidence in the outcome of Bean's

penalty-phase hearing. Faced with more compelling evidence of Bean's mental impairments, it was reasonably likely that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. **[15]** The district court properly concluded that Bean sustained his burden of satisfying both the deficient performance and prejudice prongs.

**[16]** Bean did not receive ineffective assistance of counsel during the guilt phase. **[17]** Because the diminished capacity defense would have conflicted with the alibi theory, it was within the broad range of professionally competent assistance for Roehr to choose not to present psychiatric evidence that would have contradicted the primary defense theory.

**[18]** A reasonable investigation would not have necessarily unearthed evidence that Michael Hamilton was the true murderer. Bean did not seek to blame his alleged co-burglar, and the record did not reflect evidence, apart from George Schatz's recollection of two males in his residence, pointing to Michael Hamilton's guilt. Any effort to shift the blame to Michael Hamilton would have had to overcome the statements by Anders and Normal Hamilton. Roehr's representation did not fall below an objective standard of reasonableness.

**[19]** Joinder of the Schatz and Fox indictments deprived Bean of a fundamentally fair trial on the Fox charges. Consolidation lead the jury to infer criminal propensity. This impermissible inference allowed the jury to rely on the Schatz evidence to strengthen the otherwise weak case against Bean on the Fox offenses. Bean's conviction on the Fox charges had to be reversed.

**[20]** This was not a case where acquittal on one joined charge established that the jury successfully compartmentalized the evidence. **[21]** The State's only rationale was that joinder was more convenient for the prosecution to try the cases together. The State virtually conceded the absence of cross-admissibility, the lack of common modus operandi, and the possible prejudicial effect of joinder. **[22]** Bean's conviction of the charges arising from the murder, robbery, and burglary of Fox had to be reversed.

**[23]** The State supplemented its disputed fingerprint evidence with circumstantial proof of Bean's guilt. A rational trier of fact could have interpreted the evidence as establishing that Bean had investigated Fox's neighborhood before the crimes, had worn sunglasses to commit the crimes, and had sought a familiar

location to abandon Fox's stolen property. [24] The evidence was sufficient to find Bean guilty beyond a reasonable doubt. [25] Although he Fox evidence was sufficiently weak to warrant reversal on the basis of prejudicial joinder, it was not so weak as to preclude retrial.

Judge O'Scannlain concurred in part and dissent in part, expressing disagreement with the majority's conclusions that Bean received ineffective assistance of counsel at the penalty phase, and that joinder of the indictments denied him of a fundamentally fair trial.

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## COUNSEL

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Clayton S. Tanaka, Deputy Attorney General, Sacramento, California, for the respondent-appellant/cross-appellee.

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## OPINION

THOMAS, Circuit Judge:

Anthony Cornell Bean was convicted of the first-degree murder, robbery, and burglary of Beth Schatz and Eileen Fox and sentenced to death. After the district court granted Bean's habeas petition as to his sentence but denied habeas relief as to his conviction, Warden Calderon appealed and Bean cross-appealed. We reverse the district court's decision as to Bean's conviction for the Fox charges, but otherwise affirm.

### I

### A

At some point during the early morning hours of June 26, 1980, a disturbance awakened George Schatz in his mobile home in Sacramento, California. Rising from his bed, he saw two young African-American men in his bedroom. One of theses men ordered him to lie back down on the bed and forbade him to get up, while the other stood across the room. Schatz lay back down on his bed and stared straight up. He realized at this juncture that

his fifty-six-year-old wife, Beth, was not in the bed with him. As Schatz lay without moving in his bed, he heard the noise that the two men were making as they moved around his home, and eventually lost consciousness.

When he regained consciousness, he no longer heard any noises. He rose, walked around the bed, and found his wife lying on the floor on her back, naked. Schatz tried to awaken her, only to discover that she was dead. He then called the police, who took him to the hospital. Once there, he realized for the first time that he had been injured: he had sustained six wounds to the head area and one to his neck, a broken nose, and two black eyes. Beth Schatz had died from multiple head wounds, with injuries concentrated on the left side of her skull.

Several items of property were missing from the Schatzes' home, including a television set, a deer rifle, a shotgun, George Schatz's wallet, a money clip with $120, a jewelry box containing several pieces of jewelry, and a 1977 Oldsmobile Cutlass automobile. At approximately 9 a.m. on June 26, 1980, the Sacramento Police Department (the "police") recovered the Schatzes' abandoned automobile from a vacant lot about two miles' distance form their home. The police found a ball-peen hammer on the front floorboard of the car, near the passenger seat. A subsequent investigation revealed the presence of human blood and hair on the hammer.

After examining the crime scene, the police found "strong indication[s]" that shoes Bean and his brother owned and shared had made shoe prints in a flower bed on the south side of the Schatzes' residence. In addition, a fingerprint on a kitchen window scene that the intruders had removed and a palm print on the kitchen counter were positively identified as belonging to Bean.

On July 11, 1980, the Police received an anonymous telephone call from a woman who claimed to have personal knowledge that Bean was responsible for the Schatz crimes. The police later learned that this woman had no personal knowledge of the crime, but was merely relaying facts =she claimed to have learned from her sister, Cecelia Anders. Anders gave a statement to the police and ultimately testified at Bean's trial. She asserted that Bean and Michael Hamilton had come to her apartment on June 26, 1980, during the early morning. Bean told Anders that he probably had killed a woman that night, saying "I don't know if I killed that bitch," and "I don't know if she's dead or not." Bean

also admitted that he had stolen a rifle and a television set, described the scene of the crimes as a mobile home park, and accurately described the location of the Schatzes' stolen car. Norman Hamilton, Michael's brother and the father of Anders' child, was staying at Anders' apartment on June 26. He also made a statement to the police and testified at trial. In the former, Norman denied hearing Bean admit to hitting or killing a woman, and based any knowledge about the incident on statements by his brother, Michael. However, at trial, Norman claimed Bean had recounted beating a woman.

Bean's defense relied on his own testimony that he had attempted to burglarize the Schatzes' residence the morning immediately preceding the homicide, leaving a fingerprint on a window screen and a palm print on the kitchen counter adjacent to his point of entry. The burglary was aborted when Bean heard a toilet flush and became apprehensive that he would be discovered. He testified that he was not present at any time during the Schatz crimes; nor did he attempt to blame Michael Hamilton for those crimes.

B

On June 29, 1980, Eileen Fox, a sixty-five-year-old woman, was found dead in her Sacramento, California residence. After being alerted by Fox's neighbor, the police arrived to find Fox's front door partially open and what appeared to be half of a pair of broken glasses lying on the front porch. Upon entering Fox's home, the police found Fox's dead body lying on the living-room floor just inside the front door, surrounded by the contends of a torn grocery bag. The police also discovered the other half of the broken glasses. Lying next to Fox's body was a pair of brown, plastic-rimmed sunglasses.

Fox's death had arisen from a heart attack precipitated by multiple injuries to the face, ear, and head area. The coroner who examined Fox opined that she had been beaten by a blunt object, such as a human fist or foot. On cross-examination, the coroner agreed that all of Fox's head injuries were consistent with an unbroken fall, except for a single injury to her left ear.

The next day, June 30, 1980, Fox's car was found with the keys in the ignition, in a parking lot approximately one and one-quarter miles from her home. Her purse was lying on the

passenger side of the front floorboard, and her wallet was retrieved from an ivy bed not far from where the car was parked.

At trial, the State of California presented evidence of fingerprints that had been recovered from the sunglasses lying beside Fox's body. The prosecution's latent print expert took photographs of one of the lenses of the sunglasses before attempting to lift any latent print. After taking these photographs, he made three "lifts" from the glass lens by applying fingerprint lift tape. The tape containing these "lifts" was placed on a fingerprint card, and the examining officers determined that the "lifts" could not contribute to any identification. After the third lift, photographs were taken of the remaining residue on the lens. Based on one of these photographs, four prosecution experts identified the print as matching the third finger of Bean's left hand. However, Bean's experts contested this identification, all agreeing that the print originally visible on the sunglasses was a composite of several overlaid prints.

In addition to this fingerprint evidence, the State called Fox's neighbor, Mary williams, as a witness. Williams testified that she had seen Bean sitting in bushes in the part across the street from Fox's residence on three separate occasions. The last time she had noticed Bean had been three weeks before Fox's murder.

C

After being presented with evidence on both the Schatz and Fox crimes, a Sacramento County jury convicted Bean of the following charges: (1) two counts of first degree murder for Beth Schatz and Eileen Fox; (2) one count of assault with a deadly weapon on George Schatz; (3) two counts of burglary; and (4) two counts of robbery. The jury also found true three special circumstances: (1) the murders were committed during the commission of a robbery; (2) the murders were committed during the commission of a burglary; and (3) both murders were of the first degree and Bean stood convicted of multiple murder.

During the penalty phase of the trial, the prosecution presented two aggravating circumstances: a prior burglary conviction, and an incident in which Bean allegedly fired a sawed-off shotgun at two men in a car. The jury subsequently returned a verdict of death for the Schatz murder, and a verdict of life in prison without the possibility of parole for the Fox murder.

On direct appeal, the California Supreme Court affirmed Bean's conviction and sentence in their entirety. *See People v. Bean*, 760 P.2d 996 (Cal. 1988), *cert. denied*, 494 U.S. 1038 (1990). After the Superior Court of Sacramento County scheduled Bean's execution, the United States District Court for the Eastern District of California entered an order staying the execution to permit appointment of counsel to represent Bean in federal habeas corpus proceedings.

Bean then filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254, whereupon the federal district court granted a stay of execution to permit Bean to exhaust his state remedies. In response, bean filed a petition for writ of habeas corpus in the California Supreme Court, which the court denied "on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims." *See In re Bean*, No. S040182 (Cal. Feb. 23, 1995). As support for this assertion, the court cited *In re Clark*, 855 P.2d 729 (Cal.1993).

After exhausting his state remedies, Bean filed an amended federal habeas corpus petition. Respondent Calderon (also referred to herein as the "State") filed a motion to dismiss the petition, arguing that the grounds on which the California Supreme Court denied the petition were sufficiently adequate and independent to bar federal review. The district court denied the State's motion to dismiss because, among other reasons, California's timeliness rule was not clear enough at the time of Bean's purported procedural default to foreclose federal review on the merits. Agreeing with this rational, we subsequently denied the State's petition for a writ of mandamus directing the district court to vacate its order. *Calderon v. United States Dist. Court*, 96 F.3d 1126 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

After remand, the parties adopted the stipulation regarding the propriety of an evidentiary hearing on certain claims, including the ineffectiveness of trial counsel at the guilt and penalty phases of trial. After an eight-day evidentiary hearing, the magistrate judge recommended that the district court grant habeas relief with respect to Bean's death sentence, observing that Bean's penalty-phase counsel had rendered ineffective assistance by failing adequately to investigate and present a case in mitigation. The

magistrate judge recommended the denial of habeas relief as to Bean's conviction.

The district court entered its judgment vacating and setting aside Bean's sentence of death because of the ineffective assistance of counsel he had received during the penalty phase of his trial. IN accordance with the magistrate judge's recommendations, the district court denied relief as to the guilt phase.

The State appealed, asserting two claims: (1) California's timeliness procedural requirements constituted an adequate and independent state procedural bar to federal merits review; and (2) Bean was not denied the effective assistance of counsel at the penalty phase of his trial. Bean, in turn, filed a notice of cross-appeal raising three arguments: (1) his trial counsel rendered ineffective assistance by failing to prepare a diminished capacity defense to the Schatz crimes and neglecting to investigate the accomplice and prosecution witnesses sufficiently; (2) the joinder of the Schatz and Fox charges violated his due process rights; and (3) there was insufficient evidence to sustain his conviction for the burglary, robbery, and murder of Fox.

We review de novo a district court's decision to grant or deny a habeas petition under 28 U.S.C. § 2254, *see Smith v. Stewart*, 140 F.3d 1263, 1268 (9th Cir), *cert. denied*, 119 S. Ct. 336 (1998), and the grant of summary judgment, *see Belgarde v. Montana*, 123 F.3d 1210, 1214 (9th Cir. 1997). Because Bean filed his habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-122, 100 Stat. 1214 ("AEDPA"), the provisions of the AEDPA do not apply to this case. *Jeffries v. Wood*, 114 F.3d 1484, 1495-1496 (9th Cir.) (en banc), *cert. denied*, 118 S. Ct. 586 (1997); *accord Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997).

II

We initially must reject the State's claim that Bean procedurally defaulted his claim of ineffective assistance of counsel at the penalty phase, and therefore cannot receive federal review of it. In *Calderon v. United States District Court,* a prior decision in this case, we addressed the precise assertion the State seeks to raise anew here "that California courts regularly and consistently applied the timeliness procedural bar even before *Clark*." *Calderon v. United States Dist. Court*, 96 F.3d 1126, 1130 (9th Cir.

1996) [hereinafter Bean I]. We held that "California's timeliness rule, at least as applied to a pre-*Clark* procedural default" like Bean's, "does not provide an adequate state ground barring federal review on the merits." *Id.* at 1131.

In this appeal, the State offers no new rationale for revisiting this issue, content simply to reiterate the argument it lost in *Bean I*. Because we have previously resolved this precise issue, the State's argument founders on the jurisprudential doctrine of law of the case, "under which an appellate court does not reconsider matters resolved on a prior appeal." *Jeffries v. Wood*, 114 F.3d 1484, 1488-1489 (9th Cir. 1997) (en banc). Heeding the interests of consistency and finality, *see Jeffries*, 114 F.3d at 1489, we accordingly decline to disturb our own previous resolution of this procedural dispute.

## III
## A

[1] The district court correctly concluded that Bean received ineffective assistance of counsel at the penalty phase of his trial. To establish ineffectiveness of counsel, Bean must demonstrate that his counsel's performance at the penalty phase of his trial was deficient, and that the deficient performance prejudiced his defense. *See Strickland, v. Washington*, 466 U.S. 668, 687-90 (1984).

[2] Bean's penalty-phase defense was disorganized and cursory. A month and a half before the penalty phase, the court had appointed Harold Machen to serve as Bean's counsel for the penalty phase along with Thomas Roehr, the attorney who had represented Bean during the guilty phase of his trial. Yet during this month and a half, Machen engaged in no preparation for the penalty phase and conducted no investigation of penalty-phase issues. Instead, Machen chose to rely entirely upon the information Roehr had previously amassed concerning a potential competency defense. This deficiency was not remedied by Roehr, who apparently believed that the trial judge had prohibited him from participating in any aspect of the penalty phase, except for argument. He therefore virtually abdicated responsibility for the penalty phase, leaving its preparation and presentation to Machen.

[3] The two attorneys' confusion over their respective roles exacerbated deficiencies in the development of mitigating evidence.

Before Bean's trial, Roehr contacted two mental health experts, Dr. Axelrad, a psychiatrist, and Dr. Weissman, a clinical psychologist, both for opinions on Bean's mental state. Both doctors strongly recommended further neuropsychological testing to elucidate the impact of organic brain damage on Bean's cognitive functioning. IN fact, Dr. Axelrad specifically suggested the name of a well-respected Sacramento psychologist who could administer the neuropsychological tests. However, no such testing occurred until the weekend immediately preceding the penalty phase, approximately ten months later, when Roehr contacted Dr. Axelrad, who agreed to arrange for Dr. Blunt, a neuropsychologist, to perform the tests. Consequently, both Roehr and Machen were unaware of the results of that testing when the penalty phase began.

[4] In addition to delaying for over ten months in following the explicit recommendations of two mental health experts, Bean's counsel failed to furnish other necessary information to the experts who testified during the penalty phase, and failed to prepare these experts adequately for their testimony. Dr. Axelrad, the only mental health expert who had reviewed any documents regarding Bean's life history, did not testify. Dr. Weissman, who had earlier requested information about Bean's offenses and his social, medical, and educational history, received no case-related material from Bean's counsel, apart from a written report of the neuropsychological tests Dr. Blunt had performed. Bean's counsel did not contact Dr. Weissman to prepare him for the penalty phase until a day or two before his testimony, when he expended only one or two hours in readying his testimony. At the penalty phase, Dr. Weissman could not definitively opine whether Bean had suffered brain damage and whether Bean was able to appreciate the criminality of his conduct, but could merely testify that Bean suffered from an organic personality disorder and was moderately defective in intelligence. Similarly, Dr. Blunt, who also appeared at the penalty phase, did not review the facts of Bean's case before testifying on the basis of her last-minute testing that Bean had moderate brain damage. In addition, while voicing her belief that Bean was definitely impaired in his ability to appreciate the criminality of his conduct, she admitted that she had not studied the relevant California legal standards. In sum, the penalty phase defense was at best woefully ineffective; at worst deleterious.

[5] In contrast, at Bean's 1996 district court evidentiary hearing, Bean's counsel presented abundant new mental health evidence showing that Bean was functionally mentally retarded; that he suffered from post-traumatic stress disorder, 'based upon his childhood experiences; that he was brain-damaged; that his drug usage precluded him from forming the intent to kill, rob, or burglarize; and that he was incompetent to stand trial. Drs. Axelrad, Weissman, and Blunt also gave newly definitive and expansive opinions on Bean's mental impairments, based on the information about Bean's social history and other recent testing that was newly available to them. Dr. Axelrad concluded that Bean wa unable to function normally and that his probable drug use would have prevented him from forming the intent to kill or rob on the dates of the murders. Rejecting his pre-trial conclusion that Bean was competent, Dr. Weissman opined that Bean had been suffering from serious mental deficiencies at the time of the crimes. Finally, Dr. Blunt reaffirmed her previous finding of brain damage and asserted that Bean had not been competent to stand trial in 1981.

[6] None of the conclusions reached by the experts testifying at the federal habeas hearing were unavailable to trial counsel. Indeed, as Dr. Weissman stated in his affidavit:

> Had I been provided the kind of material I now have and that I requested in 1980 following my initial evaluation of Mr. Bean and given an opportunity to review it, I would have testified that Mr. Bean exhibited substantial physical, mental, and emotional impairments that were relevant to each of the above sentencing factors in mitigation.

[7] Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel. *See, e.g., Smith v. Stewart*, 140 F.3d 1263, 1268 (9th Cir.) ("It is undisputed that trial counsel presented no mitigating evidence at the presentencing hearing . . . ."), *cert. denied*, 119 S. Ct. 336 (1998); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir.) ("[T]he transcript of the pre-sentencing hearing reveals that Correll's attorney failed to call witnesses or present any evidence at the pre-sentencing hearing, although he stated on the record that he knew of people who were willing to testify on Correll's behalf."), *cert.*

*denied*, ___ S. Ct. ___, 1998 WL 635677 (Nov. 9, 1998); *Clabourne v. Lewis*, 64 F.3d 1372, 1384 (9th Cir. 1995) ("[The defendant's counsel] did not call any witnesses, introduce any evidence of [the defendant's] history of mental illness, or argue any mitigating circumstance besides [the defendant's] mental condition at the time of the offense.").

The State asserts that the magistrate judge erred by evaluating the performance of Bean's trial counsel on the basis of "modern competency of counsel standards," rather than 1981 standards, which would have deemed Bean's representation to be constitutionally adequate. However, the State offers no authority for its contention that "[t]he standards of presenting the penalty phase of a death penalty case in 1981 represented the presentation of gross abnormalities versus contemporary standards of presenting am ore detailed study of all possible deficiencies."

**[9]** Moreover, we have previously recognized an attorney's duty to investigate and present mitigating evidence of mental impairment in the context of a 1979 capital sentencing hearing, *see Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir. 1988). To be sure, ineffective assistance must be evaluated "from counsel's perspective at the time." Strickland, 466 U.S. at 689. However, the ineffectiveness at issue in this case nit not arise from failure to employ novel or neoteric tactics. Rather, it resulted from inadequacies in rudimentary trial preparation and presentation: providing experts with requested information, performing recommended testing, conducting an adequate investigation, and preparing witnesses for trial testimony. These were not alien concepts in 1981, but were an integral thread in the fabric of constitutionally effective representation.

The State also attacks the magistrate judge's characterization of Machen, rather than Roehr, as lead counsel for the penalty phase. Whatever the merits of this characterization, we regard it as irrelevant to our conclusion that Machen and Roehr's collective failure to elicit mitigating testimony from mental health experts, apparently arising from the belief of each that the other was primarily responsible for preparing the penalty-phase defense, fell "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690; *see also Jackson v. Herring*, 42 F.3d 1350, 1364 & n. 28, 1366-68 (11th Cir. 1995). It is the quality of the assistance received, not the identity of the provider, which is at issue.

Finally, the State contends that, given the timing and constraints of Machen's appointment, he was not incompetent for failing to begin preparing for the penalty phase until after the end of the guilt phase. According to the State, these "constraints" included a lack of authorization to participate actively as co-counsel until after the jury delivered its verdict. Belying this interpretation, however, the record reflects simply that Machen would have no part in the guilt phase, apart from having standing to be present at the trial in consultation with Roehr if he so desired. IN other words, the trial court imposed no restrictions upon Machen's ability to familiarize himself with Bean's background, to reestablish contact with Drs. Axelrad and Weissman, and to develop a penalty-phase strategy. While there was no investigator assigned exclusively to Machen, the State has offered no reason why Machen could not have coordinated his efforts with those of Roehr's investigator. The limited time between Machen's appointment and the penalty phase, far from excusing Machen's lack of preparation before the penalty phase, made that early preparation all the more crucial.

**[10]** All of these considerations inexorably lead us to agree with the district court and the magistrate judge that Bean did not receive effective assistance of counsel at the penalty phase of his capital trial.

B

It is not enough, of course, for Bean to establish ineffective assistance of counsel. He must also demonstrate that as a result thereof, there was a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. For purposes of assessing prejudice, we find more guidance in "those cases in which no mitigating evidence was put on than those cases in which cumulative evidence was put on." *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995) (ruling that defendant was prejudiced by penalty-phase defense in which attorney presented testimony of defendant, defendant's ex-girlfriend, and mental health expert), *cert. denied*, 517 U.S. 1111 (1996).

**[11]** Although Roehr and Machen did elicit the testimony of two experts, the experts' lack of preparation and the limited informational foundation for their conclusions severely undercut

their utility to Bean's penalty-phase defense. As the magistrate judge remarked, "Dr. Weissman, the back-up expert, could not be certain of petitioner's problems without further development. Dr. Blunt, while espousing the opinion that petitioner was brain damaged, did so on the basis of last minute tests. Her testimony was less than persuasive at best given this context, and a seeming artifice at worst." These two witnesses therefore "did little to aid in [Bean's] fight for his life," *Hendricks*, 70 F.3d at 1044.

**[12]** In addition, the family portrait painted at the federal habeas hearing was far different from the unfocused snapshot handed the superior court jury. The jury which committed Bean to death had no knowledge of the indisputably sadistic treatment Bean received as a child, including repeated beatings which left a permanent indentation in his head. Along with numerous other potentially mitigating factors, his developmental delays, including placement in classes for the "educable mentally retarded," were reported to the jury only in the vaguest of terms.[1]

**[13]** Moreover, this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances. Indeed, the prosecution presented scant evidence of aggravating factors: Bean's 1979 burglary conviction and an altercation with two men in which Bean allegedly fired a shotgun. In assessing the potential implication of the mitigating evidence Bean's counsel failed to present, we find it noteworthy that the jury was initially divided over the appropriateness of the death penalty, deadlocking as to both murders before ultimately returning a death verdict for the Schatz case and a verdict of life without parole for the Fox case.

**[14]** All of these considerations "undermine confidence in the outcome" of Bean's penalty phase hearing. *Strickland*, 466 U.S. at 694. Faced with more compelling evidence of Bean's mental

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1. For instance, Machen elicited the following nebulous testimony from Bean's mother, Beatrice Bean, on direct examination:

> Q: And did [Bean] complete his education as far as getting a high school diploma?
>
> A: No.
>
> Q: Was he ever in any special education classes?
>
> A: Yes.
>
> Q: And why was this?
>
> A: Well, he didn't pass. I moved him--I moved him to another--I put him back because he didn't learn the first one.

impairments, therefore, it is reasonably likely that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695-96.

**[15]** For these reasons, we find the district court properly concluded that Bean sustained his burden of satisfying both the deficient performance and prejudice prongs of *Strickland*. Hence, we affirm the district court's grant of habeas relief as to Bean's sentence.

## IV

**[16]** The district court and magistrate judge also correctly concluded that Bean did not receive ineffective assistance of counsel during the guilt phase of his trial. Bean bases his ineffective-assistance claim on two grounds: first, that Roehr unreasonably rejected a potential diminished capacity defense to the Schatz crimes; and second, that Roehr failed to investigate Bean's alleged accomplice and key prosecution witnesses who testified about eh Schatz offenses. Because neither allegation fulfills both prongs of the *Strickland* standard, we decline to grant habeas relief to Bean on the basis of guilt-phase ineffectiveness of counsel.

### A

Bean initially contends that Roehr was ineffective for failing to pursue a diminished capacity defense to the Schatz crimes. Pointing to the uncontested fingerprint evidence and the two prosecution witnesses who testified about his confession, Bean argues that Roehr erred in advancing an alibi defense on his behalf. Instead, Bean asserts, a reasonably competent attorney would have presented evidence showing that Bean's mental impairments, coupled with his habitual use of PCP, incapacitated him from forming the requisite intent for the crimes with which he was charged. According to Bean, because Roehr failed to investigate Bean's background thoroughly, he unreasonably rejected a diminished capacity defense.

**[17]** These contentions fail to establish that Roehr's performance was deficient. On the contrary, because the diminished capacity defense Bean proposes would have conflicted with the alibi theory, "it was within the broad range of

professionally competent assistance for [Roehr] to choose not to present psychiatric evidence which would have contradicted the primary defense theory." *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir.), *cert. denied*, 1998 WL 635677 (Nov. 9, 1998). To the extent that Bean challenges Roehr's decision to forgo the diminished capacity defense in favor or the alibi defense, this challenge is misplaced. In light of Bean's assertion to Roehr that he had not been at the Schatz residence at the time of the crimes, his reluctance to blame his alleged co-burglar, and his own refusal to adopt the diminished capacity defense, Roehr made a reasonable strategic choice to present an alibi defense. Once Roehr reasonably chose that theory, largely on the basis of Bean's own representations, his duty to investigate the directly conflicting diminished capacity defense was at an end. *See Turk v. White*, 116 F.3d 1264, 1267 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1073 (1998); *but see Johnson v. Baldwin*, 114 F.3d 835, 839-40 (9th Cir. 1997) (holding that under the circumstances of that case, an unreasonable failure to investigate and discredit a weak alibi defense was prejudicial ineffective assistance of counsel).

B

Bean further argues that Roehr was deficient in failing to investigate fully his alleged accomplice in the Schatz crimes, Michael Hamilton, and the key prosecution witnesses in that case, Cecelia Anders and Norman Hamilton. Like Bean's first basis for his ineffective-assistance claim, this argument fails to establish that Roehr's performance was deficient.

**[18]** At the outset, although Bean asserts that a reasonable investigation would have enabled Roehr to present evidence suggesting that Michael Hamilton was Beth Schatz's actual killer, he bases this contention on the premise that he and Michael Hamilton were both present at the scene of the Schatz crimes--a premise that would have conflicted with his primary alibi defense. Even in the absence of such a conflict, a reasonable investigation would not have necessarily unearthed evidence that Michael Hamilton was the true murderer. Bean did not seek to blame his alleged co-burglar for the murder in his trial testimony, and the record does not reflect evidence, apart from George Schatz's recollection of "two" males in his residence, pointing to Michael Hamilton's guilt. Rather, any effort to shift the blame for Schatz's

murder onto Michael Hamilton's shoulders would have had to overcome the statements by Anders and Norman Hamilton, recounting Bean's admission that he had killed Beth Schatz. Thus, Roehr's representation did not "f[a]ll below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Nor may Bean rest his ineffective-assistance claim upon Roehr's supposed failure to investigate Anders and Norman Hamilton properly. Contrary to Bean's assertion, Roehr did interview Norman Hamilton. While Bean emphasizes the timing of that interview--April 21, 1981, the day before jury selection--we note that the jury did not render its verdict until June 8, 1981, a month and a half later. Had any significant facts disproving Bean's guilt emerged from the interview with Norman Hamilton, Roehr would have had ample time to present them to the jury. Furthermore, Bean offers no concrete support for his speculation that Roehr could have uncovered the police manipulation that allegedly prompted Norman Hamilton to testify against Bean at trial.

In comparison, although one might question the strategic character of Roehr's decision not to interview Anders, Anders' 1996 declaration proffers no reason for discounting her trial testimony against Bean and does not explain her decision to recant that testimony, beyond baldly stating that she lied at Bean's trial. Thus, there is no "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. There is no sign that, even had Roehr interviewed Anders, he could have persuaded her to change her testimony in 1981. Even if we assume that Roehr's decision not to interview Anders was deficient, therefore, Bean cannot show that this decision prejudiced his defense.

## V

**[19]** After careful examination of the record, we conclude that joinder of the Schatz and Fox indictments deprived Bean of a fundamentally fair trial on the Fox charges. Consolidation of the relatively weak Fox case with the compelling Schatz charges in a single trial violated Bean's right to due process by leading to the jury to infer criminal propensity. This impermissible inference, in turn, allowed the jury to rely upon the Schatz evidence to strengthen the otherwise weak case against him for the Fox

offenses. Because the joinder was constitutionally impermissible, we reverse Bean's conviction of the Fox charges.[2/]

A

Before we assess the legal merits of Bean's due process claim, it is useful to revisit the relevant factual and procedural history. At the trial level, Bean twice attempted to sever the Schatz and Fox charges on two grounds: the evidence for each case was not admissible in the other; and the relatively stronger evidence of Bean's guilt in the Schatz case could bolster the relatively meager evidence of Bean's guilt in the Fox case. Determining that there was a "considerable similarity" between the two sets of offenses, the trial court determined that no prejudice was likely to result from the joinder, and that any prejudice that did arise could be minimized through jury instructions.

During its closing argument at trial, the State repeatedly urged the jury to consider evidence of Bean's "modus operandi" to determine whether he was guilty of *both* the Schatz and Fox crimes. For instance, the State argued that "having done it once, it made it that much easier three days later and about 10 blocks away for [Bean] to murder Mrs. Eileen Fox." Similarly, the State commented upon "the similarity of the two crimes," and asserted that Bean was guilty of the Fox offenses because "the theft of her car and the manner in which it was perpetrated suits his style and his M.O., as you are well aware of it. . . ."

For its part, the trial court delivered several instructions that could have applied only to the Schatz crimes without explaining which instruction applied to which set of offenses. For instance, the jury was instructed regarding the liability of principals and aiders and abetters, as well as a felony-murder theory in which proof of a conspiracy establishes the guilt of all conspirators, without reference to the crime to which the instruction applied. The sole instruction that addressed the existence of multiple counts read as follows: "Each count charges a distinct offense. You must

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2. **As we have already affirmed the district court's grant of habeas relief as to Bean's death sentence, we need not reach his argument that the prejudicial misjoinder of the Schatz and Fox charges requires reversal of his sentence on the Schatz charges, as well as reversal of his conviction of the Fox offenses.**

decide each count separately. The defendant must be found guilty or not guilty of any or all of the offenses charged. Your findings as to each count must be stated in a separate verdict."

On direct appeal, the California Supreme Court disagreed with the trial court's conclusion on cross-admissibility, finding that "the manner in which the crimes were committed was not sufficiently similar to reflect a common modus operandi." *People v. Bean*, 760 P.2d 996, 1005 (Cal. 1988). Thus, "evidence of each murder was not 'cross-admissible.'" *Id.* At the same time, the court ruled that the trial court had properly denied Bean's motion for severance, and that the joinder of the Schatz and Fox crimes did not require reversal of Bean's conviction. *Id.* at 1009. As support for this ruling, the court relied upon two factors: in the court's estimation, neither set of offenses was more inflammatory or rested upon much greater evidence than the other; and the state received "significant" benefits from joinder. *Id.* at 1008.

On September 13, 1995, having filed his amended federal habeas petition, Bean moved for summary judgment on the bases that the joinder of the Schatz and Fox charges resulted in a fundamentally unfair trial, and that there was insufficient evidence to convict him of the Fox offenses. Although the magistrate judge recommended summary judgment for Bean on the issue of whether the joinder had unfairly tainted his trial on the Fox charges, the district court rejected this recommendation in a May 8, 1996 memorandum and order. Bean now appeals to us to reverse this ruling.

B

In evaluating Bean's claim of constitutionally impermissible joinder, we apply the following test:

> [t]he propriety of a consolidation rests within the sound discretion of the state trial judge. The simultaneous trial of more than one offense must actually render petitioner's state trial fundamentally unfair and hence, violative of due process before relief pursuant to 28 U.S.C. § 2254 would be appropriate.

*Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991) (finding that because habeas petitioner's trial was not prejudiced by joinder, no fundamental unfairness resulted) (alteration in original) (citation omitted). Accordingly, misjoinder must have "result[ed] in prejudice so great as to deny [Bean] his Fifth Amendment right to a fair trial" in order for us to find that Bean suffered a constitutional violation. *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). As the joinder of the Schatz and Fox charges did in fact prejudice Bean's trial on the latter counts, we conclude that Bean's due process rights were violated.

We have previously acknowledged that there is "a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986) (citation omitted). In *Lewis*, we explained this risk by observing that "[i]t is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial," and by recognizing studies establishing "that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." *Id.* at 1322.

These concerns resonate with particular force here: not only did the trial court join counts for which the evidence was not cross-admissible, but the State repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of Bean's criminal activities. Thus, the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime," *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir. 1987), when the State's closing argument and the import of several of the instructions it heard urged it to do just the opposite.

The general instructions the trial court issued availed little in ameliorating the prejudice arising from joinder. We have expressed our skepticism about the efficacy of such instructions on at least one prior occasion: "To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal

capacities." *Lewis*, 787 F.2d at 1323 (quoting *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985)). Apart from the intrinsic shortcomings of such instructions, however, the instructions here did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other. In fact, such an admonition would have conflicted with the trial court's conclusion that the offenses evinced "considerable similarity." here, moreover, the jury received its instructions "in the waning moments of the trial," a factor that further diminished their impact. *See Lewis*, 787 F.2d at 1323; *cf. Herring v. Meachum*, 11 F.3d 374, 378 (2d Cir. 1993) (finding that habeas petitioner had not made required showing of actual prejudice, based partly on fact that jury "was instructed on three separate occasions that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other").

We agree with Bean that prejudice resulted from the disparity between the evidence supporting his guilt of the Schatz crimes and the proof of his guilt of the Fox offenses. The evidence connecting Bean to the Schatz crimes included his undisputed fingerprint on the kitchen window screen; his undisputed partial palm print on the kitchen counter; tennis shoe imprints matching shoes he shared with his brother; and his statements to Norman Hamilton and Anders, revealing his role in assaulting Beth Schatz and in robbing the Schatzes.

By contrast, the sole direct evidence of Bean's complicity in the Fox offenses involved a fingerprint on broken sunglasses found beside Eileen Fox's body, a fingerprint that Bean vigorously disputed at trial through expert testimony. Apart from the fingerprint evidence, the jury considered Bean's own ambiguous and contradictory statements about ownership of similar sunglasses; the testimony of Eileen Fox's neighbor that Bean had been in Fox's neighborhood on three occasions, including one incident in which the neighbor saw him hiding in some bushes across from Fox's residence; the presence of a hair on the sunglasses consistent with Fox's hair; and Bean's familiarity with the area where Fox's stolen property had been discarded. This substantial disparity between the Schatz evidence and the Fox evidence prompts us to conclude that the strong evidence of Bean's guilt in the Schatz crimes tainted the jury's consideration of Bean's complicity in the Fox offenses. *See Lucero v. Kerby*, 133 F.3 1299, 1315 (10th Cir.) ("Courts have recognized that the joinder of

offenses in a single trial may be prejudicial when there is a great disparity in the amount of evidence underlying the joined offenses. One danger in joining offenses with a disparity of evidence is that the State may be joining a strong evidentiary case with a weaker one in the hope that an overlapping consideration of the evidence [will] lead to convictions on both.") (alteration in original) (citation omitted), *cert. denied*, 118 S. Ct. 1684 (1998); *see also Lewis*, 787 F.2d at 1322 (considering relative strength of evidence underlying joined charges as factor showing undue prejudice). This creates "the human tendency to draw a conclusion which is impermissible in the law: because he did it before, he must have done it again." *United States v. Bagley*, 772, F.2d 482, 488 (9th Cir. 1985.)

In concluding the Bean suffered a violation of his constitutional rights, we are mindful that prejudice generally does not arise from joinder when the evidence of each crime is simple and distinct, even in the absence of cross-admissibility, *See, e.g., Lewis*, 820 F.2d at 1071 ("[I]n light of the relative simplicity of the issues and the straightforward manner of presentation, we conclude that the district court did not abuse its discretion in denying the defendant's motion to sever the offenses."); *Drew v. United States*, 331 F.2d 85, 91 (D.C. Cir. 1964) ("The federal court, including our own, have, however, found no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials. . . ."). This determination hinges on the assumption that, if properly instructed, a jury can compartmentalize the evidence, rather than considering it cumulatively, *see Lewis*, 820 F.2d at 1071; *Drew*, 331 F.2d at 9, an assumption that cannot apply here, where the jury was not properly charged.

**[20]** This is not a case where acquittal on one joined charge establishes that the jury successfully compartmentalized the evidence. *See Featherstone*, 948 F.2d at 1503-04 ("[I]t is apparent from the jury's discerning verdict that it followed the court's instructions to regard each count as separate and distinct."); *see also Herring*, 11 F.3d at 378 ("[T]he jury's acquittal one the . . . conspiracy itself goes far toward answering any claim that corroboration on that count improperly motivated the jury's verdict as to the other charges."); *Robinson v. Wyrick*, 735 F.2d 1091, 1094 (8th Cir. 1984.) ("In the present case, there has been no showing that [the defendant] was prejudiced; the jury could not find him guilty of . . . murder, so it appears that the jurors were able to

distinguish the two charges."). In the instant case, no such acquittal offered affirmative evidence of the jury's ability to assess the Schatz and Fox evidence separately.

**[21]** In addition, the State's defense of joinder in this case is exceedingly asthenic. Indeed, the only rationale the State could muster in support of joinder was that it was more convenient *for the prosecution* to try the disparate cases together. The State virtually concedes the absence of cross-admissibility, the lack of common modus operandi, and the possible prejudicial effect of joinder. Thus, if we were to adopt the State's theory, joinder would never be improper. Against serious concerns about the fundamental fairness of a capital trial, the shallow defense of prosecutorial expedience has a hollow ring.

**[22]** For these reasons, we reverse Bean's conviction of the charges arising from the murder, robbery, and burglary of Eileen Fox. We do not reverse the Schatz conviction because the evidence was so strong that any due process violation in the joinder had no "'substantial and injurious effect or influence in determining the jury's verdict'" with regard to that offense. *Brecht v. Abramson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

## VI

In his first claim of error, Bean attacks the sufficiency of the evidence supporting his conviction of the Fox offenses. Although we reverse that conviction because of prejudicial joinder, we must still evaluate the sufficiency of the underlying evidence, as the Double Jeopardy Clause would preclude retrial if the evidence were insufficient. *See Lewis*, 787 F.2d at 1323. Accordingly, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Applying this standard, although the evidence was extremely thin, we are compelled to conclude it was sufficient to sustain Bean's conviction of burglarizing, robbing, and murdering Fox.

Ben attempts to draw support from our ruling in *Mikes v. Borg*, 947 F.2d 353 (9th Cir. 1991):

> [I]n a case in which the prosecution's theory is that the defendant's fingerprints were placed on the murder weapon at the time of the commission of the crime or were lift at the scene of the crime during its commission, the record must show that the object was inaccessible to the defendant or that the defendant did not have access to the crime scene, during the relevant period prior to the crime's commission.

*Id.* at 361. This reliance is mistake. As we made clear in *Mikes* itself, the standard of proof we articulated therein applies only to so-called "fingerprint-only" cases in which the prosecution's exclusive evidence of guilt is the presence of the defendant's fingerprints at the crime scene or on the murder weapon. *See id.* at 356; *see also Taylor v. Stainer*, 31 F.3d 907, 909 (9th Cir. 1994) (noting that in *Mikes*, requirements for a "fingerprint-only case" had been described).

**[23]** In contrast, the State here supplemented its admittedly disputed fingerprint evidence with other circumstantial proof of Bean's guilt. A rational trier of fact could have interpreted this evidence as establishing that Bean had investigated Fox's neighborhood well before the crimes, had worn the sunglasses to commit the crimes, and had sought out a familiar location to abandon Fox's stolen property.

**[24]** Indeed, even under the *Mikes* standard, a trier of fact could have reasonably inferred that Bean's fingerprint was impressed upon the sunglasses at the time of the murder. The hair that was found on the sunglasses suggested that Fox's hair had landed on the sunglasses at the time of the murder, and the sunglasses' broken frame could be construed as evidence of a struggle. While the sunglasses could have acquired Bean's fingerprint in several other ways--a third person murderer might have gained possession of them and worn them while committing the murder, for example--the record does not support this hypothesis, and the state need not eliminate every theory of innocence for Bean's conviction to stand. *See Taylor*, 31 F.3d at 910. Hence, the evidence was sufficient for a rational factfinder to find Bean guilty beyond a reasonable doubt, *see Mikes*, 947 F.2d at 356.

Bean's conviction of the Fox charges admittedly rests upon fingerprint evidence that Bean's defense experts contested at trial. Our deference to state-court factual findings is arguably less under the pre-AEDPA regime that under 28 U.S.C. § 2254 as amended by the AEDPA.[3] Nevertheless, we must still presume such findings to be correct unless they are "not fairly supported by the record." *See* 28 U.S.C. § 2254(d)(8) (1996); *see also Paradis v. Arave*, 130 F.3d 385, 390 (9th Cir. 1997) ("Pursuant to 28 U.S.C. § 2254(d), the factual findings of the state court are presumed correct."). The jury convicted Bean of the Fox charges after listening to the testimony of expert prosecution and defense witnesses who offered conflicting opinions on the possibility of using the fingerprint evidence for identification purposes and on whether the fingerprint was Bean's. Because, therefore, the record fairly supports both the inference that Bean left his fingerprint on the sunglasses and the inference that he did not, we decline to disturb the presumption of correctness that section 2254 accords state-court factual findings. We do note, however, that absent the fingerprint evidence, the case against Bean for the Fox offenses would have been considerably weaker, and a rational trier of fact would have been hard-pressed to convict him.

**[25]** In sum, although the Fox evidence was sufficiently weak to warrant reversal on the basis of prejudicial joinder, it was not so weak as to preclude retrial. Thus, given the constraints of habeas of review coupled with the extremely deferential standard of review concerning evidence sufficiency, we affirm the district court and magistrate judge's conclusion that the evidence was sufficient to sustain the conviction that the evidence was sufficient to sustain the conventions.

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3. *Compare* 28 U.S.C. § 2254(d)(8) (providing that state-court findings of fact are "presumed to be correct," unless federal court, after reviewing record, "concludes that such factual determination is not fairly supported by the record"; placing burden on petitioner to establish erroneousness of factual determination only if federal court does not itself find that record does not fairly support factual determination) *with* 28 U.S.C. § 2254(e)(1) (1998) (providing that state-court findings of fact are "presumed to be correct," and that petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence.").

VII

We reverse the district court's decision as to Bean's conviction for the burglary, robbery, and murder of Fox, but affirm the district court's judgement in all other respects. We remand to the district court for entry of an appropriate order for retrial as to the Fox offenses and resentencing as to the Schatz charge.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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O'SCANNLAN, Circuit Judge, concurring in part and dissenting in part:

I joined in most of the Court's opinion but respectfully dissent from Parts III and V. I agree that Bean did not procedurally default his claim of ineffective assistance of counsel, that Bean received effective assistance of counsel, at the guilt phase of the trial and that there was sufficient evidence to convict Bean of the Fox murder. I disagree, however, on the two remaining issues: I conclude that Bean received effective assistance of counsel at the penalty phase and that joiner of the Schatz and Fox indictments did not deprive Bean of a fundamentally fair trial.

I

While I recognize that Bean's representation at the penalty phase was by no means flawless, it did not "so undermine [] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."
*Strickland v. Washington,* 466 U.S.668,686 (1984).

The Supreme Court has read the Sixth Amendment right to trial to include a right to counsel. *See id.* at 685. To satisfy this right to counsel, it is not enough "that a person who happens to be a lawyer is present at trial alongside the accused." *Id.* Rather, the "accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair." *Id.* The Supreme Court has set a low standard for effective assistance guarantee of

legal representation . . . [but] is simply to ensure that criminal defendants receive a fair
trial." *Id.* at 686. The Court, therefore, has stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

*Id.* The Court cautioned that

> The availability of intrusive post-trial inquiry into attorney performance... would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of the counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected.

*Id.* at 690. Thus, while we must ensure that an accused has effective counsel at trial and, in Bean's case, at his sentencing hearing, we can do no more than require that the counsel provided was adequate.

The Supreme Court's two part *Strickland* test governs our review of an accused's counsel. It provides that a defendant claiming ineffective assistance must demonstrate that (1) counsel's actions were outside the wide range of professionally competent assistance, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See id.* at 687-694.

Bean's counsel was not constitutionally ineffective during the penalty phase. Bean's counsel presented nine witnesses with more than 200 pages of witness testimony (page number includes cross-examination of witnesses), including two psychiatric experts, Dr. Weissman and Dr. Blunt. Dr. Blunt testified that, after performing five neurological tests, she was convinced that Bean

was organically brain damaged from three lesions on the brain. This brain damage, she testified, involved an inability to think, to form judgments, to plan or to appreciate the criminality of conduct. Dr. Weissman testified that he had used six different tests on Bean and discovered that Bean was suffering from organic personality disorder and mental retardation (Bean had the mental age of an eight to eleven-year old in terms of "thinking" and "capacity to understand his environment"). Dr. Weissman testified further that, although he had reached no firm conclusion, he found that Bean had "soft signs" of "potentially mild to moderate degree of organic . . . brain damage." Counsel's presentation of the two psychiatrists was not, as the majority claims, a "failure to elicit mitigating testimony from mental health experts."

Bean's counsel also presented testimony from Bean's family and friends which showed a very poor upbringing. The jury knew that Bean was whipped by his mother, was placed in classes for "slow learners," was suspended from school several times, was made a ward of juvenile court at an early age, left home at age fifteen, and was interned at "Boys Ranch," some sort of juvenile detention center. The jury could also have gleaned from the testimony that Bean's father hit or whipped Bean, even though Bean's father denied beating Bean when asked directly.[4]

Bean alleged that his counsel inadequately investigated his background, inexcusably delayed his neuropsychological testing, inadequately prepared the witnesses, asked the expert witnesses the wrong questions and, overall, failed to present a compelling or reliable mitigation argument. Bean is correct that his counsel did a less than perfect job during the penalty phase. They could have presented Bean's mitigating evidence in greater and more compelling detail. Their inadequacies, however, do not "'amount[ ] in every respect to no representation at all.'" *Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir. 1995) (quoting *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985). Bean's arguments would have

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**4. When asked at the Sentencing Hearing what he would have done to Bean if he had not come home, Bean's father answered "I was going to whip him." In addition, when asked if he had anything to do with Bean leaving home, Bean's father answered "Well, I tell you, when you got kids you got to have a firm hand with them, you know, when you are raising them up. See, when the boys get a certain age they don't want to mind, see. But at my house, when they come up, I was the boss of the house. I don't let my kids rule my house. I'm the one that rules the house."**

greater merit if the issue before this court were whether Bean's counsel did a *good* job during the penalty phase of his trial. The issue here is, however, whether Bean's counsel was constitutionally competent, a much lower standard.

This case differs markedly from other recent cases in which this court had held that counsel was constitutionally deficient during the penalty phase. In *Smith v. Stewart*, 140 F.3d 1263 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 336 (1998), this court held that trial counsel provided ineffective assistance because counsel "provided *no evidence at the penalty phase* and virtually no argument," despite the fact that evidence of mitigating circumstances" was rather near the surface." *Id.* at 1269 (emphasis added). Counsel's only argument involved "a few asthenic comments to the effect that Smith still denied his guilt and that he was just 30 years of age. Nothing else!" *Id.* at 1268.

In *Correll v. Stewart*, 137 F.3d 1404 (9th Cir.), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___ (1998), counsel failed to present *any* evidence of the petitioner's purported mental illness as a mitigating factor. Defense counsel's argument at the sentencing hearing look a total of eight transcript pages. We held that "[t]his almost complete absence of effort on the part of Correll's counsel to investigate, develop, and present mitigating evidence, including evidence of Correll's psychiatric history and his condition at the time of the murders, constitutes deficient performance 'outside the wide range of professionally competent assistance.'" *Id.* at 1412 (quoting *Strickland*, 466 U.S. at 690). In addition, defense counsel met with his client for just five minutes in the month between the jury verdict and the pre-sentencing hearing.

Other cases are to the same effect. In *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), counsel failed to conduct *any* investigation into mitigating evidence without a strategic rationale to justify the lack of preparation. *See id.* at 1043. In *Clabourne*, counsel "did not call any witnesses, introduce any evidence of Clabourne's history of mental illness, or argue any mitigating circumstances beside Clabourne's mental condition at the time of the offense." *Clabourne*, 64 F.3d at 1384. Clabourne's entire mitigation argument took up six pages of the sentencing hearing transcript. We held that "the total absence of advocacy [fell] outside *Strickland*'s 'wide range of professionally competent assistance,'" and that counsel's representation at the sentencing

hearing "amount[ed] in every respect to no representation at all." *Id.* at 1387 (citations and internal quotation marks omitted).

These cases are instructive; Bean's counsel was not derelict in their duties compared to any of them. In these cases, counsel generally conducted no investigations, presented no mitigating evidence, made no arguments on behalf of their clients, and brought few (or no) witnesses to the stand. Of course, these cases do not stand for the proposition that only a complete failure to present mitigating evidence during the penalty phase will be sufficient to warrant a writ of habeas corpus for ineffective assistance of counsel, but they do serve as a valuable comparison. Bean's counsel *did* offer mitigating evidence to show Bean's background information and mental deficiencies and *did* make reasonable arguments on Bean's behalf. Although it would have been preferable for counsel to have asked different questions, presented more detailed mental health evidence, and investigated Bean's family background more carefully, the Constitution does not demand as much. Bean's counsel was not guilty of a "total absence of advocacy" amounting to no representation at all. *Clabourne*, 64 F.3d at 1387. In my opinion, therefore, Bean does not satisfy the first prong of the *Strickland* test.

Furthermore, under the second prong of the *Strickland* test, it is unlikely that, had the more detailed evidence now available regarding Bean's background and mental health been presented to the jury, the outcome of the trial would have changed. The jury was exposed to the majority of the evidence this court now points to as mitigating factors. Certainly, some of the more graphic details of Bean's childhood were not shared with the jury. The jury knew, however, that Bean spent time in juvenile detention, was whipped by his parents and left home at fifteen. Similarly, while the jury did not hear all the possible evidence of Bean's mental difficulties, the jury did hear two experts testify to Bean's brain damage. The added details discussed by the majority do not sufficiently change the overall picture of Bean's condition and history such that there is a reasonable probability that the outcome of the sentencing hearing would be different. In my opinion, therefore, Bean does not satisfy the second prong of the *Strickland* test.

I believe that the district court's decision to grant Bean a writ of habeas corpus for ineffective assistance of counsel during

the penalty phase was error and should be reversed. I, therefore, respectfully dissent from Part III.

II

Nor do I believe Bean has demonstrated that he suffered actual prejudice from the district court's discretionary refusal to sever Bean's two murder counts. We address this issue on collateral review after the California Supreme Court has thoroughly considered the facts and arguments. *People v. Bean*, 46 Cal.3d 919 (1988). Out of respect for important notions of federalism, comity and finality, our review should be deferential to the state court findings.

As a general matter, "[t]he propriety of a consolidation rests within the sound discretion of the state trial judge." *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1989) (quoting *Tribitt v. Wainwright*, 540 F.2d 840, 841 (5th Cir. 1976). In order for this court to issue a writ of habeas corpus, Bean must have shown that the trial court's failure to sever the counts against him "*actually* render[ed] [his] state trial fundamentally unfair and hence, violative of due process." *Id.* at 1502 (emphasis added); *see also Herring v. Meachum*, 11 F.3d 374, 377 (2nd Cir. 1993) ("In considering whether a violation of the due process occurred, the emphasis must be on the word 'actually.'") Neither the potential for prejudice nor even a high probability of prejudice will suffice; Bean must establish that prejudice *actually resulted* "from the events as they unfolded during the joint trial." *Herring*, 11 F.3d at 377-378. The Second Circuit has clearly articulated the procedural posture for this habeas corpus review:

> [H]abeas petitioners challenging their state convictions under the general fairness mandate of the due process clause bear an onerous burden. Because of the significant procedural protection provided by direct review through the state system, we will not lightly conclude that state court proceedings were so arbitrary as to violate due process.

*Herring*, 11 F.3d at 378 (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (presumption of fidelity and legality attaches to state criminal proceedings)).

Bean alleges, and the majority agrees, that Bean was prejudiced because joinder allowed evidence of the Schatz crime, evidence that otherwise would not have been admitted, to be used by the prosecution to bolster its weak Fox case. The California Supreme Court found that the evidence for the two murder counts was not cross-admissible. Certainly, this finding heightens the likelihood of prejudice because joinder risks tainting the jury's view of the accused with evidence that would not otherwise have been admissible. It does not lead, however, to an automatic finding of actual prejudice. Also, as Bean and the majority point out, joinder in these cases can be especially dangerous when strong evidence of one crime is used to bolster weak evidence of a second crime. The California Supreme Court considered all these arguments and still concluded, I think correctly, that Bean did not show that there was a substantial danger of prejudice from the joinder of the two offenses.

We have not directly addressed this issue in a habeas case. In *United States v. Johnson*, 820 F.2d 1065 (9th Cir. 1987), a direct review case, however, we noted in dictum that:

> Even if the evidence would *not* have been admissible, the district court did not abuse its discretion because the jury was not likely in this case to confuse which count particular evidence was introduced to establish. When evidence concerning the other crime is limited or not admissible, our primary concern is whether the jury can reasonably be expected to "compartmentalize the evidence" so that evidence of one crime does not taint the jury's consideration of the other crime.

*Johnson*, 820 F.2d at 1071 (emphasis added). The court elaborated further, "[e]ven where evidence of one of the crimes is particularly weak, . . . we consider[ ] principally whether the jury was likely to have been confused." *Id.* at 1071 n.6 (citations omitted). The main issue we must decide is, therefore, whether the jury was reasonably able to distinguish evidence introduced in one case from evidence introduced in the other.

The California Supreme Court found that the evidence against Bean was sufficient on both counts and that "no spillover effect" of the evidence occurred. *Bean*, 46 Cal.3d at 940. I agree. The evidence introduced for both the Fox offense and Schatz offense was simple and distinct, making it likely that the jury was able to keep the evidence separate when considering the various counts against Bean. *See Herring*, 11 F.3d at 378 ("moreover, because the evidence with respect to each murder was distinct and easily compartmentalized, the risk of jury confusion at petitioner's trial was significantly limited."). The evidence of the Fox offenses consisted of Bean's fingerprint on a pair of sunglasses, witness testimony that Bean had been seen multiple times "casing" the Fox residence, and Bean's inconsistent testimony regarding ownership of the sunglasses. The evidence in the Schatz charge consisted of witnesses testifying to Bean's incriminating statements, a partial palm print, fingerprint, and footprints at the Shatz residence, and witness testimony. Neither the Fox nor the Schatz crimes involved complicated scenarios or crimes that involved confusing scientific evidence or complex transactions.

In addition, the two crimes were distinctly different. The Schatz crime involved two assailants breaking into a mobile home at night and attacking two victims with a hammer. The Fox crime involved a single assailant attacking a single woman with his fist or foot as she entered her house during the day. The evidence used to prove such distinctly distinguishable crimes is unlikely to have confused the jury. The majority, for example, is concerned that the jury would have been confused as to which crime the instructions regarding aiding and abetting, and conspiracy applied. This, I think, underestimates jury intelligence. Surely a jury would be able to realize that instructions regarding aiding and abetting, or conspiracy apply to the crime involving multiple assailants and not to the crime involving a single assailant. The majority also suggests that acquittal as to one of the counts would have established that the jury had compartmentalized the evidence. This is not an appropriate guide where, as here, there is sufficient evidence to convict the accused on both counts. In any event, the jury did bring in separate verdicts for the two murders and decided Bean should be sentenced to death for the Schatz murder and should get life imprisonment for the Fox murder.

The majority also worries that the trial court did not properly instruct the jury. It cites *Johnson* for the proposition that

a jury can only compartmentalize the evidence if properly instructed to do so by the court. The jury instruction we found to be sufficient in *Johnson* was "[e]ach count charges a separate crime. You must decide separately what the evidence in the case shows about the crime." *Id.* at 1071. This instruction is not significantly more explicit than the instruction in Bean's trial. Although the trial court's instructions to the jury were certainly limited regarding the separateness of the crimes and their evidence, the jury was told it must "decide each count separately" and that "[e]ach count charges a distinct offense."

While I realize that the joinder of two counts always includes the risk that the jury will be prejudiced against a defendant charged with multiple crimes or that the jury will consider the evidence cumulatively, "joinder of offenses has long been recognized as a constitutionally acceptable accommodation of the defendant's right to a fair trial." *Herring*, at 377. In this case, I am not convinced that Bean has presented evidence to show that he suffered actual prejudice as a result of the joinder of his two murder counts. I, therefore, must dissent from Part V. I would not second-guess the California Supreme Court's holding that joinder was not an abuse of discretion, and would affirm Bean's conviction for the Fox murder.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY CORNELL BEAN,

Petitioner-Appellee/Cross-Appellant,

v.

ARTHUR CALDERON, Warden,

Respondent-Appellant/Cross-Appellee.

Nos. 97-99023, 97-99024

D.C. No. CIV-S-90-0648 WBS GGH

ORDER

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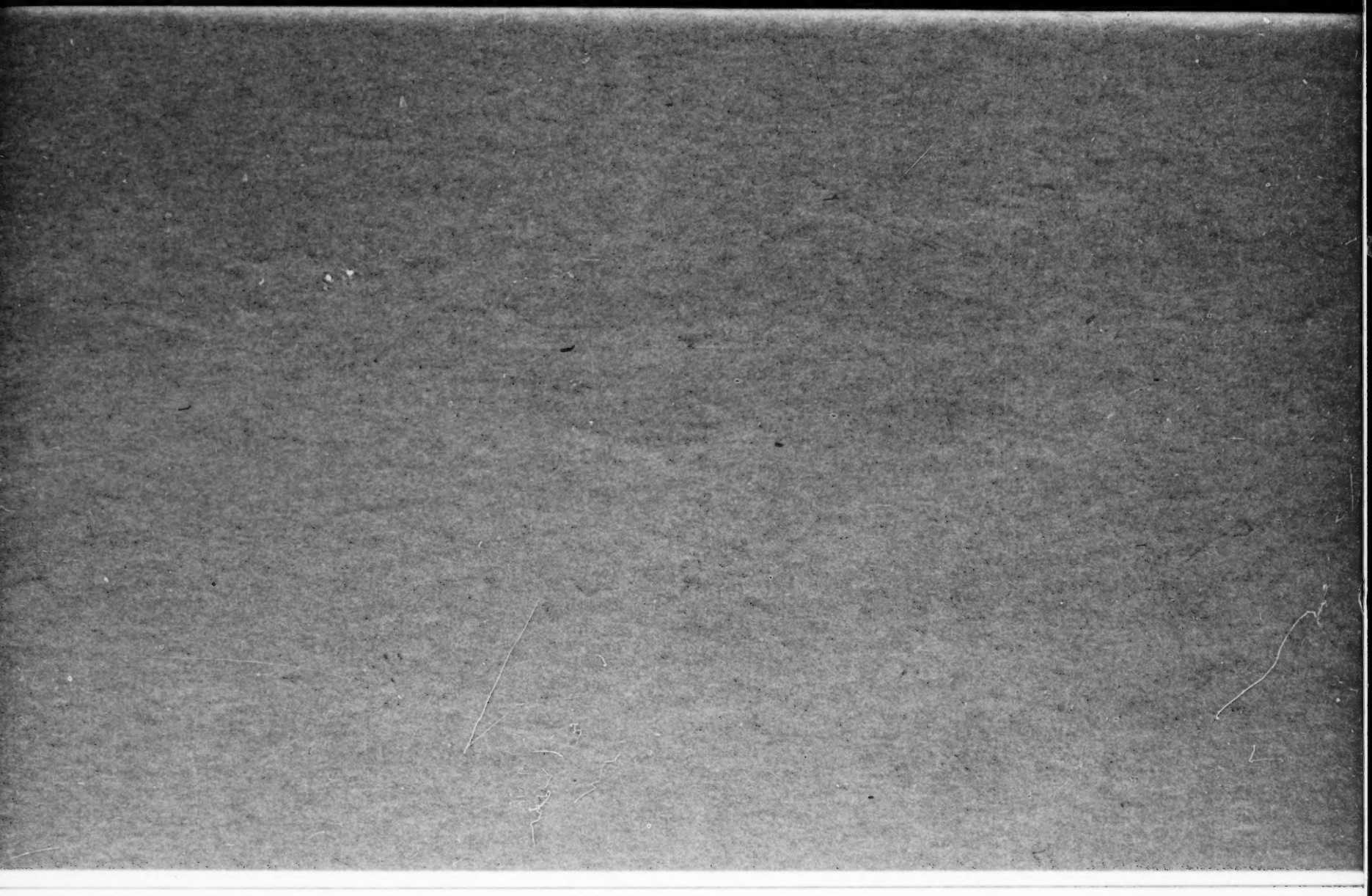
Before: CANBY, O'SCANNLAIN, THOMAS, Circuit Judges.

Judges CANBY and Thomas have voted to deny the petition for rehearing. Judge O'SCANNLAIN has voted to grant the petition for rehearing. Judges CANBY, O'SCANNLAIN, and Thomas have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed.R.App.P.35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.



No. S040182

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

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IN RE ANTHONY CORNELL BEAN

ON

HABEAS CORPUS

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Petitioner's application for leave to supplement the petition is granted. The request to withdraw declarations is denied.

The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims. (In re Clark (1998) 5 Cal.4th 750-774-775.)

Claims II, III, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXIV, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVII, and XLVIII are also procedurally barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial. (In re Harris (1993) 5 Cal.4th 813, 826; In re Clark (1993) 5 Cal.4th 750, 765; In re Waltreus (1965) 62 Cal.2d 218, 225. See also, People v. Bean (1988) 46 Cal.3d 919.)

Claims IV, XXXII, XXXV, XXXVI, XLVI, XLIX, L, LI, LII, and LIII have been considered on their merits (see In re Clark, supra, 5 Cal.4th 750, 797-798), but, in light of the record of the trial and related proceedings, fail to state a prima facie case entitling petitioner to relief.

Mosk, J. is of the opinion an order to show cause should issue.

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Chief Justice

FILED
NOV 17, 1995
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| **ANTHONY CORNELL BEAN,**<br>Petitioner,<br>v.<br>**ARTHUR CALDERON,**<br>Respondent. | Civ. S-90-0648 EJG GGH<br>DEATH PENALTY CASE<br>FINDINGS AND RECOMMENDATIONS |

Respondents' motion to dismiss, filed July 18, 1995, came on for hearing October 12, 1995, before the undersigned. Andrea M. Miller and Andrew S. Love appeared for petitioner. Clayton S. Tanaka and Harry Columbo appeared for respondent. Having reviewed the motion and the documents in support and opposition and heard the arguments of counsel, the

court has determined that respondent's motion to dismiss for procedural default should be denied.

BACKGROUND

In July, 1981 a jury convicted petitioner of the murders of Beth Schatz and Eileen Fox. Petitioner was sentenced to death for the murder of Beth Schatz and to life without possibility of parole for the murder of Eileen Fox.

On September 19, 1988, the California Supreme Court affirmed petitioner's convictions on appeal. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988), cert. denied 494 U.S. 1038 (1990). After the California Supreme Court relieved petitioner's state-appointed counsel in April, 1990, petitioner, acting in propria personam, applied in May 1990 to this court for a stay of execution and for the appointment of counsel. On July 26, 1990, this court appointed counsel to represent petitioner. Counsel filed in this court on July 18, 1991, a petition for writ of habeas corpus.

On September 26, 1991, this court issued its order staying the case, allowing petitioner to exhaust his state remedies. On May 26, 1994, counsel for petitioner filed a state petition for writ of habeas corpus. On February 22, 1995, the California Supreme Court denied the state petition without issuing an order to show cause and without holding an evidentiary hearing.

The state supreme court denied the state habeas petition on exhaustion on three grounds:

1. all claims were denied as untimely raised;

2. 39 claims were barred on account of the failure to raise them properly on direct appeal or at trial;

3. 10 claims were denied on their merits as failing to state a prima facie case entitling petitioner to relief (whether based on state law or federal law was not revealed).

Petitioner notified the court of exhaustion of remedies, re-opened this proceeding, and filed an amended petition for writ of habeas corpus on March 22, 1995. Respondents filed a preliminary answer on June 8, 1995, and on July 21, 1995, filed the present motion to dismiss based on procedural default. Because it is an affirmative defense and because respondents move for dismissal, respondents bear the burden of establishing that California's procedural default rules are adequate to bar federal review. Karis v. Vasquez, 828 F.Supp. 1449, 1463 n. 21 (E.D. Cal. 1993). The court discusses in turn each ground of denial stated by the California Supreme Court.

PROCEDURAL DEFAULT

1. Legal Standards

Based on concerns of comity and federalism, federal courts will not review federal questions presented by a habeas petition if a prior state court decision denying relief to the petitioner rests on a

state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038 (1989). A federal court faced with an ambiguous state court decision presumes that there is no bar to the federal court's consideration of federal claims " . . . unless the last state court rendering a judgment on the case clearly and expressly states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263 (citations omitted). Federal questions should be reached only "when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for that decision." Coleman at 735.

To be independent of federal law, a state procedural practice must not "depend upon an

antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, a state procedural practice must be "clearly defined," id. at 1462, "firmly established," James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-1836 (1984), and "regularly followed," Id. A rule is regularly followed if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 1217 (1989). The Ninth Circuit has explained the adequate state ground requirement as follows:

> [T]he procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon, 959 F.2d at 1461 (citations omitted).

If the state court decision is supported by an independent and adequate state ground, the federal

court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. 15 1043 (citing Murray v. Carrier, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644 (1986)). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1469-1470 (1991) (quoting Murray, 477 U.S. at 488). Examples of cause include showings "that the factual or legal basis for a claim was not reasonably available to counsel," "that some interference by officials made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488, 106 S.Ct. at 2645. The Court has limited the "fundamental miscarriage of justice"

exception to those who can show actual innocence, id. at 490; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993), including actual innocence of the death penalty, Smith v. Murray, 477 U.S. 527, 537-38, 106 S.Ct. 2661 (1986); Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).

2. Analysis

a. Timeliness

In the instant case, the California Supreme Court, citing In re Clark, 5 Cal.4th 750, 774-775, (21 Cal.Rptr.2d 509) (1993), issued an opinion which first denied petitioner's entire state habeas petition "on the ground that it is untimely, does not identify those claims regarding which petitioner lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims."

Even respondent concedes that the California Supreme Court's overall timeliness ruling is

overbroad. The ruling seemingly encompasses even those claims that had been timely raised on direct appeal, but which were "re-exhausted" in the state habeas petition filed after initial proceedings in this court. Of course, the fact that petitioner has exhausted claims "too much" has never been held to be a procedural bar to a claim that is otherwise devoid of procedural taint. However, because of the court's findings with respect to the remainder of the "untimely" claims, it is not necessary to segregate the old claims from the new ones.

A brief review of the history of the California courts' timeliness bar is instructive in determining this basis for the court's ruling. The California courts have generally disfavored unduly delayed petitions. See, e.g., People v. Jackson, 10 Cal.3d 265, 110 Cal.Rptr. 142 (1973); In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633 (1970). However, the early cases provided little guidance as to just what

constituted undue delay or what would excuse a finding of undue delay. In re Stankewitz, 40 Cal.3d 391, 396-97 n. 1, 220 Cal.Rptr. 302 (1986), the court stated that a petitioner must "point to particular circumstances sufficient to justify substantial delay." However, the court did not define how much delay was "substantial."

In 1989, the California Supreme Court established standards, including timeliness standards, for filing habeas corpus petitions in capital cases. Those standards require appellate counsel to investigate possible bases for a habeas petition. California Supreme Court, Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Cases, 50 Cal.3d 1-4 (Dec. 1993). A petition filed within 60 (now 90) days of the filing of the appellate reply brief is presumed timely. Id.

Petitioners who did not file within this time period could establish an absence of substantial

delay in two ways. First, they could provide specific facts showing the petition "was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual bases for the claim and became aware, or should have become aware, of the legal basis for the claim." Standard 1-1.2 (emphasis in original). Second, petitioners could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 [the final date of Stankewitz] . . . the petition was filed within a reasonable time after that date." Standard 1-1.3. Petitioners failing to meet these standards could seek to demonstrate "good cause by showing particular circumstances sufficient to justify substantial delay." Standard 1-2.

In 1993, the California Supreme Court clarified its timeliness rules and set forth specific exceptions to the timeliness bar. In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). The court reviewed the

state procedural limitations applicable to petitions for habeas corpus, including the rules applicable to delayed petitions, repeated petitions, and piecemeal presentation of claim. In describing prior state practice limiting habeas corpus relief, the court stated: "because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted." Id. at 763.

The Ninth Circuit, agreeing that no clear state procedural guidelines existed, has held that, at least prior to 1993, California courts inconsistently applied the state timeliness standards. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert denied, 115 S.Ct. 1175 (1995); see also, Karis v. Vasquez, 828 F.Supp. 1449, 1463 (E.D. Cal. 1993).

The California Supreme court cited Clark in the instant case as a bar to petitioner's state habeas petition. In doing so, the Court retroactively applied Clark because, by definition, the timeliness bar means

petitioner should have raised the claims earlier. The problem is that, although petitioner filed the state habeas petition at issue in this case after Clark, at the time petitioner should have raised the claims, i.e., within a reasonable time after the final date of Stankewitz, Clark was not the law.[1/] The question then is whether the federal court should respect the state court's retroactive application of its Clark timeliness rules to bar consideration of petitioner's claims.

Deere v. Calderon, 890 F.Supp. 893 (C.D. Cal. 1995) briefly addresses the application of Clark to a procedural default which took place prior to the Clark opinion. In Deere, petitioner filed a first petition prior to Clark and a second petition after Clark. The second

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1/ Petitioner's conviction was affirmed on appeal on September 19, 1988, at a time when both the pre-Clark and pre-Standards procedural rules were in effect. Stankewitz was the applicable law concerning timeliness of state habeas petitions. Petitioner filed his state "exhaustion" habeas petition prior to the Clark decision as well.

petition had been denied as untimely by the California Supreme Court, citing Clark. The Deere court found that the California Supreme Court had consistently applied the Clark standards to the nine habeas petitions filed after Clark. The Deere court thus concluded that Clark's timeliness rule was adequate to bar federal review. In reaching that conclusion, the court only briefly addressed the retroactivity issue:

> It is not unfair or unjust to now honor the procedural bar in the face of the previous ruling of inconsistency in California. Clark did not change the requirements for filing state habeas petitions in California. Clark merely put petitioners on notice that previously established standards would be followed.

890 F.Supp. at 900.

In summarily determining that retroactivity was not a problem, the district court in Deere did not discuss two important points. First, it failed to consider that, as described above, the California Supreme Court itself acknowledged that its timeliness rules were

sporadically applied, and understood its opinion in Clark to mark a significant change in its use of the timeliness rules.[2/] Second, the Deere court failed to examine the retroactivity issue as applied to the law of procedural default. Most importantly in the last respect, Deere is contrary to Supreme Court and Ninth Circuit authority.

A litigant must have a fair opportunity to comply with known procedural rules. In order to provide this fair opportunity, the state procedural bar at issue is the one in place at the time the claim should

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2/ Clark itself is inconsistent in its characterization of the past fidelity of the state courts to apply procedural bar to state habeas petitions on account of untimeliness. At one point, Clark intimates that Stankewitz simply affirmed the longstanding practice that required petitions to be timely filed, Clark, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 530-531; at another, Clark implicitly concedes that the Stankewitz bar was not consistently applied. Id. at 786, 21 Cal.Rptr.2d at 533. In addition, insofar as the discovery of new claims is concerned, Clark expressly concedes that prior to 1989, counsel had no obligation to investigate the possibility of new claims. Id. at 783, 21 Cal.Rptr.2d at 531.

have been raised. Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 857 (1991). In Ford, the state supreme court had established a new procedural rule governing the timely assertion of a Batson claim. The state court then retroactively applied the new rule to bar the petitioner's Batson claim. The Supreme Court found that since the rule was not firmly established at the time the petitioner should have raised the claim, it was inadequate to bar federal review. 498 U.S. at 424-25. This circuit, citing Ford, has acknowledged that the applicable procedural bar to consider is the one in effect "at the time of the petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).

Respondent can legitimately argue that the above cited law permits petitioner to claim that prior to Clark, he had a "right" to file a belated state habeas petition, and that California law certainly has never stood for that proposition. While respondent may be correct in this assertion, the issue here is whether

California law was sufficiently, consistently applied in the past (pre-Clark) with respect to untimely petitions, and this court is bound by the Ninth Circuit holding that it was not. This court is further bound by the Supreme Court and Ninth Circuit holding that any procedural default must be judged at the time the alleged default was incurred. Because any potential default herein was incurred during the pre-Clark period (see footnote 1, supra), no procedural default (bar) may be entered on account of an "untimely" petition.[3/]

B. Failure To Raise Claim On Direct Appeal Or At Trial

Citing In re Harris, 5 Cal.4th 813, 826 (21 Cal.Rptr.2d 373) (1993), Clark and In re Waltreus, 62 Cal.2d, 218, 225 (42 Cal.Rptr. 9) (1965), the California Supreme Court rejected 39 claims as "also procedurally

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3/ Petitioner argues in opposition to the motion to dismiss that California's procedural rules remain as unclear after Clark as before. For purposes of this motion, this court need not decide that issue.

barred in that they were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial." This ambiguous portion of the opinion does not indicate which of the cases cited as presenting procedural bars applies to which claim, or which claims are barred by the appeal or trial defaults.

In re Waltreus does not present a procedural bar to consideration of a claim by a federal court. Waltreus stands for the California rule that issues resolved on appeal will not be reconsidered in a petition for habeas corpus. The California Supreme Court cites to Waltreus when a state petitioner has attempted to raise issues in state habeas corpus proceedings that he already raised on direct appeal. Waltreus holds that "habeas corpus ordinarily cannot serve as a second appeal." Id. As the Supreme Court clearly stated in Ylst v. Nunnemaker, 501 U.S.797, 806, 111 S.Ct. 2590, 2596 (1991), all Waltreus stands for is the "ordinary state rule barring relitigation of claims

raised on direct appeal"; it is uninformative of the issue of procedural bar. Id. Therefore, a citation to Waltreus does not mean that this claim is procedurally barred.

The California Supreme Court's rule precluding consideration in a petition for habeas corpus of a claim which could have been, but was not raised on appeal, has been known as the Dixon rule. See In re Dixon, 41 Cal.2d 756, 759 (1953). In re Harris, cited by the California Supreme Court in denying petitioner's state habeas petition announced the court's intention to apply the Dixon rule more consistently in the future. However, as previously discussed, the procedural practice applicable to petitioner in this instance would be the one in existence at the time of his direct appeal. At the time of Bean's direct appeal, the Dixon rule was not adequate to preclude federal court consideration of a claim because it was not consistently applied by the California Supreme Court. Odle v. Calderon, 884

F.Supp. 1404, 1413 (N.D. Cal. 1995); Karis, 828 F.Supp. at 1467.

Finally, although there are several trial level procedural defaults that most probably have been consistently followed in the past, e.g., failure to object to prosecutorial misconduct, the California Supreme Court did not identify which claims were subject to what default, or what the specific default problem was with a particular claim. This court is not in the position to speculate on behalf of the California Supreme Court.

PRIMA FACIE CASE

In denying petitioner's state habeas petition, the California Supreme Court, again citing Clark at (797-798) rejected ten claims as having been considered on the merits, and that the claims failed to state a prima facie case for relief. As to these claims, respondent, citing Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) argues unpersuasively that they are unexhausted. Respondent asserts that because the state

court found that petitioner failed to state a prima facie case with respect to these ten claims, petitioner has not exhausted those claims. Respondent does not specify whether he contends petitioner has legally or factually failed to exhaust the claims which the California Supreme Court has found not to state a prima facie case. The statement of the California Supreme Court that petitioner has not stated a prima facie case (a matter not considered at all by Jackson v. Cupp), means exactly what it says, , the court has considered the matters on the merits and has found them wanting. The denying of a claim on the merits has nothing to do with exhaustion except to indicate that exhaustion has occurred.[4/] The state court was presented with the

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4/ Perhaps respondent was confusing the situation here with the Jackson v. Cupp statement that where state remedies remain available, exhaustion has not been satisfied. However, this is not the case here. The ten claims were considered on the merits and were denied. There are no available state remedies remaining for these claims. It is also possible that respondent is confusing the In re Swain, 31 Cal.2d 300, 209 P.2d 793 (1934), doctrine

"opportunity" to rule on the merits of the claims, Jackson v. Cupp, 693 F.2d at 869, and it did so; such claims are exhausted. Id. Moreover, such a holding as was made by the state supreme court in this case (denial on the merits for failure to state a prima facie case) is inconsequential to the federal courts for two reasons: (1) the state supreme court did not specify whether it denied the claims based on state or federal law; (2) if based on federal law, the federal court is not

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with the situation here. Swain stands for the proposition that the petitioner has failed to state the facts clearly enough for the state supreme court to rule on the merits, and by definition, the court has therefore not ruled on the merits. See, Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986). Such unclear claims are not exhausted. However, again, the state supreme court did reach the claims on the merits.

In the case at bar, respondent would have this court send the ten "unexhausted" claims back to state court for further determination on the merits which inevitably would result in another ruling that the claims fail to state a prima facie claim, which would then require another remand for exhaustion, which would be followed by yet another ruling. . . .Nothing in habeas corpus law requires such a volley.

bound by such a general statement in any event (Jackson v. Cupp, 693 F.2d at 869).

Therefore, the state supreme court denial of certain claims on the merits does not implicate failure to exhaust or procedural default.

FAILURE TO PRESENT A FEDERAL CLAIM

Respondent's argument that certain claims do not present a federal claim is premature. The court will not make this determination at the present time.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to dismiss be denied in its entirety.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **twenty (20)** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

"Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 13, 1995.

UNITED STATES MAGISTRATE JUDGE

1--1 Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a claim. All petitions for writs of habeas corpus should be filed without substantial delay.

1--1.1 A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 [now 90] days after the final due date for the filing of appellant's reply brief on the direct appeal.

1--1.2 A petition filed more than 60 days [now 90] days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.

1--1.3 Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1, the petition was filed within a reasonable time after that date.

*See* California Supreme Court, *Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Cases*, 50 Cal.3d 1-4 (Dec. 1993) (emphasis in original).

Supreme Court, U.S.
FILED
JUL 1 1999
ORIGINAL

No. 98-1931

In The

# Supreme Court of the United States

OCTOBER TERM, 1999

ARTHUR CALDERON, Petitioner,

v.

ANTHONY CORNELL BEAN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that the joinder of two wholly unrelated murder cases, in which the evidence was not cross-admissible, where one of the two cases was much weaker than the other, and where the prosecutor improperly argued that the cases reflected Bean's "modus operandi," rendered Bean's trial as to the weaker of the two cases fundamentally unfair.

2. Whether the Court of Appeals properly affirmed the district court's findings that trial counsel rendered ineffective assistance of counsel at the penalty phase of Bean's capital trial by failing to investigate Bean's background and by presenting a disorganized and cursory defense which excluded readily available and highly compelling mitigating evidence.

3. Whether this Court should consider the adequacy of the California Supreme Court's procedural default rules in a case where the claims upon which relief was granted were not procedurally barred.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | *i* |
| TABLE OF CONTENTS | *ii* |
| TABLE OF AUTHORITIES | *iii* |
| STATEMENT OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 6 |
| REASONS FOR DENYING THE WRIT | 8 |
| I. THE COURT OF APPEALS' HOLDING REGARDING JOINDER WAS CORRECT | 8 |
| II. THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S HOLDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSITANCE AT THE PENALTY PHASE WAS BASED ON DETAILED FACTUAL FINDINGS OF THE LOWER COURT AND ON WELL ESTABLISHED LEGAL PRINCIPLES | 15 |
| III. THE CLAIMS UPON WHICH THE COURT OF APPEALS GRANTED RELIEF WERE NOT PROCEDURALLY DEFAULTED | 28 |
| CONCLUSION | 30 |

## TABLE OF AUTHORITIES


| Case Authority | Page |
|---|---|
| *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995) | 26 |
| *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), *cert. denied* ___ U.S. ___, 118 S.Ct. 1856 (1998) | 22 |
| Calderon v. Bean, 520 U.S. 1204 (1997) | 5 |
| *Calderon v. United States District Court for the Eastern District of Calfiornia*, 96 F.3d 1073 (9th Cir. 1998) | 1, 4, 27 |
| *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995) | 16 |
| *Featherstone v. Estelle*, 948 F.2d 1497 (9th Cir. 1991) | 11 |
| *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), *cert. denied* ___ U.S. ___, 116 .S.Ct. 1335 (1996) | 21, 22 |
| *Herring v. Meachum*, 11 F.3d 374 (2nd Cir. 1993), *cert. denied* ___ U.S. ___, 114 S.Ct. 1629 (1994) | 12, 13 |
| *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 409 (1993) | 3, 4, 28 |

Page

*In Re Harris*,
5 Cal.4th 813, 21 Cal.Rptr.2d 373 (1993) ..... 4

*Middleton v. Dugger*,
849 F.2d 491 (11th Cir. 1998)..... 26

*Panzavecchia v. Wainwright*,
658 F.2d 337 (5th Cir. 1981)..... 12

*People v. Bean*,
46 Cal.3d 919,
251 Cal.Rptr. 467 (1988)..... 2, 9, 10, 11, 18

*People v. Haston*,
69 Cal.2d 233, 70 Cal.Rptr. 419 (1968) ..... 9

*Strickland v. Washington*,
466 U.S. 668 (1984)..... 16

*United States v. Disla*,
805 F.2d 1340 (9th Cir. 1986)..... 12

*United States v. Foutz*,
540 F.2d 733 (4th Cir. 1976)..... 11

*United States v. Irvine*,
756 F.2d 708 (9th Cir. 1985)..... 12

*United States v. Johnson*,
820 F.2d 1065 (9th Cir. 1987)..... 11

*United States v. Lane*,
474 U.S. 438 (1986)..... 11

*United States v. Lewis*,
787 F.2d 1318 (9th Cir.),
*amended* 798 F.2d 1250 (9th Cir. 1996)..... 11, 14

| | Page |
|---|---|
| *United States v. Nicely*, 922 F.2d 850 (D.C.Cir. 1991)..... | 12 |
| *United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995) ..... | 12, 13 |
| *United States v. Werner*, 620 F.2d 922 (2nd Cir. 1980)..... | 12 |
| *Walker v. Superior Court*, 37 Cal.App.3d 938, 112 Cal.Rtpr. 767 (1974).. | 9 |
| *Wharton-El v. Nix*, 38 F.3d 372 (8th Cir. 1994), *cert. denied* 513 U.S. 1162 (1995)..... | 11 |


**Statutory Authority**


| | |
|---|---|
| California Penal Code Section 954 ..... | 8, 9 |
| Federal Rule of Appellate Procedure 35 ..... | 6 |
| Federal Rule of Appellate Procedure 40 ..... | 6, 7 |
| United States Supreme Court Rule 10 ..... | 6, 21 |

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Anthony Cornell Bean (hereinafter "Bean"), respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit affirming in part and reversing in part the judgment of the district court which granted Bean's petition for writ of habeas corpus with respect to his death sentence and denied the petition with respect to Bean's underlying convictions.

The opinion of the Court of Appeals is reported at 163 F.3d 1073 (9th Cir. 1998) and is reproduced and attached as Appendix A to the Petition. In addition, the opinion of the Court of Appeals denying the State's petition for writ of mandamus from the district court's denial of a motion to dismiss on grounds of procedural default is reported at *Calderon v. United States District Court For the Eastern District of California*, 96 F.3d 1126 (9th Cir. 1996).

## STATEMENT OF THE CASE

On June 8, 1981, a Sacramento County jury found Bean guilty of: 1) two counts of first degree murder for the deaths of Beth Schatz and Eileen Fox, which were allegedly committed in two separate incidents; 2) assault with a deadly weapon on George Schatz; 3) two counts of burglary; and 4) two counts of robbery. The jury also found that Bean personally used a deadly weapon with regard to the Schatz incident. Robbery-murder and burglary-murder special circumstance allegations as to each murder and a multiple murder special circumstance allegation were found to be true.

On June 19, 1981, following the penalty phase of the trial, the

jury foreman advised the trial court that it was "hopelessly deadlocked" and could not arrive at a verdict as to penalty. CT 1018-1019.[1] The trial court admonished the jury and instructed them to return on Monday, June 22, 1981, for further deliberations. CT 1018. On June 22, 1981, the jury returned a death verdict for the Schatz case and a verdict of life in prison without the possibility of parole for the Fox case. CT 1021-1022. On July 20, 1981, judgment was imposed, and Bean was sentenced to death. CT 1050-1052.

The judgment and sentence were affirmed on appeal on September 19, 1988. *People v. Bean*, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988).

On July 26, 1990, the district court appointed counsel to represent Bean in federal habeas corpus proceedings. On July 18, 1991, Bean filed a federal petition for writ of habeas corpus in district court. On July 30, 1991, the State filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

On September 26, 1991, the district court vacated the State's motion for summary adjudication, and remanded the case to state court to exhaust state remedies on the ground that all but one of Bean's claims were unexhausted.[2] Bean filed his first and only petition for writ of habeas corpus in the California Supreme Court on June 1, 1994.

On February 23, 1995, the California Supreme Court denied

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[1] The Clerk's Transcript from the state court proceedings is referenced herein as "CT"; the Reporter's Transcript from the state proceedings is referenced as "RT."

[2] The one exhausted claim was that the joinder of cases violated due process.

Bean's state petition. *See* Appendix C. Although many of Bean's claims were denied on state procedural grounds, ten of them, including penalty phase ineffective assistance of counsel, were addressed and denied on the merits. The California Supreme Court applied an exception to its procedural rules so as not to procedurally bar these ten claims. *See* Appendix C, Order, *citing In re Clark*, 5 Cal.4th 750, 797-98, 21 Cal.Rptr.2d 509, 540-41 (1993).

Bean filed a federal petition for writ of habeas corpus on March 22, 1995. On July 21, 1995, the State filed a motion to dismiss the petition on the ground that the California Supreme Court's denial of the state habeas petition constituted a procedural bar to Bean's claims.

On September 13, 1995, Bean moved for summary judgment on the grounds that joinder of the two murder charges resulted in a fundamentally unfair trial, and that there was insufficient evidence to convict Bean of the Fox murder. On November 6, 1995, the magistrate judge issued its Amended Findings and Recommendations, agreeing that the joinder of the two cases created fundamental unfairness in the trial of the weaker of the two cases--the Fox case--and finding that summary adjudication was appropriate. The magistrate judge recommended the denial of summary adjudication to Bean on the issue of whether joinder of Fox unfairly tainted the convictions in the Schatz case.

On November 17, 1995, the magistrate judge recommended denial of the State's motion to dismiss, finding that the California Supreme Court's denial of the state petition did not constitute an adequate state bar. A copy of these findings is attached to the Petition as Appendix D. The State complains in its Statement of the Case that the magistrate judge refused to apply two decisions that purported to

modify and clarify California's procedural default rules--*In re Clark*, *supra*, and *In re Harris*, 5 Cal.4th 813, 21 Cal.Rptr.2d 373 (1993)--to Bean's state habeas petition "even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims . . .". Petition for Writ of Certiorari [hereinafter "Petition"], at 6. *Clark* and *Harris* purported to modify and clarify California's procedural default rules. To make this argument, however, the State has to ignore that it conceded at oral argument both before the magistrate judge and the Court of Appeals that Bean's default, if any, would have occurred before *Clark* and *Harris* were decided. *See Calderon v. United States District Court, supra*, 96 F.3d at 1130 & n. 4.

On March 29, 1996, the district court filed an order, a copy of which is found in Appendix E to the Petition, adopting the magistrate judge's findings with regard to the State's motion to dismiss and denying the State's motion.

On May 8, 1996, the district court denied Bean's motion for summary judgment on the issue of joinder, adopting the magistrate judge's findings with regard to the Schatz case and rejecting them with regard to the Fox case.

An evidentiary hearing on several of Bean's claims was held before the magistrate judge beginning on May 20, 1996, and concluding on May 30, 1996. On July 18, 1996, the State filed a petition for writ of mandate and/or prohibition in the Court of Appeals seeking an order directing the district court to vacate its March 29, 1996 order denying the State's motion to dismiss the petition. In an opinion filed on September 20, 1996, the Court of Appeals denied the mandamus petition. *Calderon v. United States District Court, supra.* On November 26, 1996, the

State's petition for rehearing was denied.

On January 23, 1997, the magistrate judge issued detailed findings and recommendations (hereafter "F&R") with regard to the disposition of Bean's habeas corpus petition. The magistrate judge recommended the denial of relief with regard to Bean's guilt phase claims, but recommended the granting of relief with regard to two of Bean's penalty phase claims: Ineffective Assistance of Counsel and Bailiff/Juror Misconduct.

On April 28, 1997, this Court denied the State's petition for writ of certiorari, which sought review of the Court of Appeals' denial of the petition for writ of mandamus. *Calderon v. Bean*, 520 U.S. 1204 (1997).

On June 30, 1997, the district court adopted the magistrate judge's findings, including that of ineffective assistance of counsel at the penalty phase and rejecting only the findings of prejudicial bailiff misconduct and prejudicial joinder. Accordingly, Bean's petition for writ of habeas corpus was denied as to guilt and granted as to penalty, and the death sentence was vacated.

The State filed a timely notice of appeal on August 20, 1997, and Bean filed a notice of cross-appeal on August 27, 1997.

On December 15, 1998, after briefing and argument, the Court of Appeals affirmed the district court's decision in all respects with the exception of the issue of joinder, as to which the Court of Appeals found that joinder rendered the conviction in the Fox case fundamentally unfair. The Court of Appeals remanded the case to the district court for entry of an order for retrial as to the Fox case and resentencing as to the Schatz convictions.

The State's petition for rehearing and suggestion for rehearing en banc was denied on March 2, 1999.

## SUMMARY OF ARGUMENT

The grounds asserted by the State to support grant of certiorari are insufficient in light of the Rules of this Court to support review of the legally and factually adequate decision of the Court of Appeals.

First, the State argues that both the severance and the ineffective assistance of counsel portions of the Court of Appeals' decision "conflict with and misapply" other decisions of the Ninth Circuit. Petition, at 8. Even assuming this assertion had any basis in fact, which it does not, there is no ground to be found in Rule 10 of this Court for a petition to be granted to attempt to reconcile decisions within a Circuit, as opposed to conflicts between Circuits. The proper procedural mechanism for attempting such intra-Circuit reconciliation is a Petition for Rehearing and Suggestion for Rehearing En Banc, thereby permitting the entire appeals court to resolve any conflict between two or more of its decisions. *See* FRAP 35, 40. The State sought such review, and on March 2, 1999, the petition for rehearing was denied and the suggestion for rehearing en banc was rejected. Notably, "[t]he full court [was] advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it." Appendix B.

Second, the State asserts that the Court of Appeals overlooked "important facts" in rendering its decision that Bean was denied effective assistance of counsel in the penalty phase of his capital murder trial. Petition, at 8. Again, assuming this assertion had a basis in fact, which it does not, Rule 10 is explicit in its statement that a petition "is rarely

granted when the asserted error consists of erroneous factual findings." A petition for rehearing by the appellate panel is the appropriate vehicle for considering facts or law "overlooked or misapprehended. . . ." FRAP 40. In asserting that the appeals court "overlooked" facts, the State in essence argues that certiorari should be granted to evaluate the factual finding of that Court without any showing that this case is sufficiently extraordinary to support a departure from the general rule against review on this ground. Moreover, in this case, the Court of Appeals was not reviewing facts in a vacuum, but affirmed the district court's ruling which upheld the detailed factual findings of a magistrate judge following an evidentiary hearing.

Third, the State asserts that the Court of Appeals' holding that the joinder of two wholly separate and unrelated counts of murder violates due process "ignores" state court findings and determinations, at least implying that the federal court ignored state court factfindings, which it did not (as there were none), disregarded state court determinations of state law, which it did not (since it relied solely on federal constitutional law) and/or that it failed to defer absolutely to the state court's determination that there was no federal due process violation, which it was not required to do.

Finally, the State argues that this case presents an important question affecting "the most basic aspects of federalism, with especially far-reaching impact on State death penalty judgments." Petition, at 8. By this statement, the State presumably refers to its argument that the Court of Appeals' failure to uphold the state's procedural default rules was erroneous. This argument is completely specious since the claims upon which relief was granted were not procedurally barred.

To grant this Petition, based upon the grounds asserted by the State, would suggest that the Writ of Certiorari is available to any litigant disgruntled by the decisions he or she received below. That has never been the purpose of the Writ and the State's attempt to elevate its arguments beyond their apparent worth should be rejected.

## REASONS FOR DENYING THE WRIT

### I.

### THE COURT OF APPEALS' HOLDING REGARDING JOINDER WAS CORRECT

The Court of Appeals determined that the joinder of two murder cases for trial violated due process where the evidence was not cross-admissible, the prosecutor repeatedly encouraged the jury to consider the two sets of charges in concert, and the trial court's instructions failed to ensure that the jury compartmentalized the evidence of the two crimes. The standard applied by the Court of Appeals to arrive at its decision was whether trial of the two offenses simultaneously rendered Bean's trial "fundamentally unfair." App. A, at 22-23. The State does not dispute the legal standard used by the Court of Appeals, *see* Petition, at 12, but rather challenges the decision on the ground that Bean was unable to show prejudice as a result of the joint trial of the two crimes. *Id.* To rely on this assertion of no prejudice, however, the State ignores both the trial record and the applicable law.

The decisions interpreting California Penal Code section 954, which at the time of Bean's trial permitted joinder of two or more

different offenses for trial,[3] found that joinder was favored in California so long as the evidence of each of the joined crimes would be, to some reasonable degree, cross-admissible with regard to the other. *Walker v. Superior Court*, 37 Cal.App.3d 938, 943, 112 Cal.Rptr. 767 (1974). At the same time, cross-admissibility was limited in substantial part to situations in which evidence regarding one crime tended to establish intent, guilty knowledge, motive, or a common scheme, plan or design with regard to the other. *People v. Haston*, 69 Cal.2d 233, 236, 70 Cal.Rptr. 419 (1968).

The trial court denied Bean's motion for severance of counts, finding that the two cases were, in fact, substantially similar and that the evidence as to each crime was therefore cross-admissible. The trial court further believed it could cure any potential prejudice that might result from joinder by jury instruction. App. A, at 21.

The California Supreme Court, however, determined that the trial court had erred in finding cross-admissibility, holding that the crimes had little, if any, similarity, and that the evidence of one would not be cross-admissible as to the other. *People v. Bean, supra*, 46 Cal.3d

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[3] California Penal Code section 954 provided, in principal part that:

> [a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offenses or two or more different offenses of the same class of crimes or offenses under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately.

In Bean's case the basis for joinder was that the separate counts charged the same class of crimes or offenses.

at 938. Nevertheless, the Court ruled that joinder did not require reversal, relying on two factors: (1) that neither set of offenses was more inflammatory than the other; and (2) the state received "significant" benefits from joinder. *Id.* at 939-40; *see* App. A, at 22.

The facts of the Schatz case were, indeed, much more inflammatory than those in the Fox case. The Schatz case, according to the prosecution, involved the late night entry of an inhabited mobile home by two men, which resulted in the killing of a woman by multiple blows to the head with a ball peen hammer and injury to her husband with the same instrumentality. *People v. Bean, supra*, 46 Cal.3d at 929-30. What happened in the Fox case is much less clear. Ms. Fox apparently died of a heart attack after being assaulted as she arrived home from shopping. *Id.* at 931. The assault did not involve a weapon and was insufficient by itself to have caused her death. In fact, the coroner who examined Ms. Fox agreed that all of the head injuries Ms. Fox suffered, except for one to her ear, were consistent with an unbroken fall. RT 1918-19, 1978-79.

In addition, the evidence against Bean in the Schatz case was substantially stronger than that in the Fox case. In Schatz, it was undisputed that Bean's fingerprints were found on a screen that had been removed from the kitchen window of the Schatz's mobile home, and his partial palm print was discovered on the edge of the kitchen counter, *People v. Bean, supra*, 46 Cal.3d at 930-31, thus, placing Bean at the scene of the crime. In addition, two witnesses testified that Bean admitted to beating and killing Ms. Schatz. *Id.* By contrast, in the Fox case, the prosecution offered evidence that an overlay of a fingerprint on a pair of sunglasses found at the scene could be identified as that of

Bean. This identification was strongly disputed by defense experts. *Id.* at 932. The only other evidence connecting Bean to the Fox offense was the identification of Bean by Ms. Fox's neighbor who testified that she had seen Bean in the park across the street from her home on three occasions, three weeks earlier. *Id.*

The Court of Appeals determined that "prejudice resulted from the disparity between the evidence supporting [Bean's] guilt of the Schatz crimes and the proof of his guilt of the Fox offenses." App. A, at 24. The Court recognized that the "strong evidence of Bean's guilt in the Schatz crimes tainted the jury's consideration of Bean's complicity in the Fox offenses." App. A, at 24.

Under federal due process law,[4] there is no question that joinder is improper and prejudicial unless the evidence as to the joined matters is cross-admissible, *United States v. Johnson*, 820 F.2d 1065, 1070 (9th Cir. 1987); *Wharton-El v. Nix*, 38 F.3d 372, 375 (8th Cir. 1994), *cert. denied* 513 U.S. 1162 (1995), except in those cases where specific instructions are given to avoid the prejudice. *United States v. Lane*, 474 U.S. 438, 450 (1986); *Featherstone v. Estelle*, 948 F.2d 1497, 1502-1503 (1991). Further, whereas the California Supreme Court noted the specific benefit of economy to weigh in favor of joinder, *People v. Bean, supra*, 46 Cal.3d at 939-940, the federal Circuit Courts disagree.

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[4] While review of severance decisions within the federal system involves application of a "manifestly prejudicial" standard, *see United States v. Lewis*, 787 F.2d 1318, 1321 (9th Cir.), *amended* 798 F.2d 1250 (9th Cir. 1986), those involving review of state court trials apply the "fundamental fairness" standard. *Featherstone v. Estelle, supra.* An analysis of the two lines of cases, however, discloses that the two standards are essentially the same in their analysis and so cases involving both standards will be cited interchangeably in this Opposition Brief.

In *United States v. Foutz*, 540 F.2d 733, 736, 738 (4th Cir. 1976), the Fourth Circuit Court of Appeals recognized that when the evidence in a joined case is not cross-admissible, the only saving effected by joinder was to the burden placed on the prosecution. Similarly, the District of Columbia Court of Appeals has said that claims of judicial economy cannot overcome the clear infringement of a defendant's right to a fair trial that results from joining two charges that bear no logical relationship one to the other. *United States v. Nicely*, 922 F.2d 850, 860-861 (D.C.Cir. 1991). *See also Panzavecchia v. Wainwright*, 658 F.2d 337, 341 (5th Cir. 1981).[5] These conclusions logically flow from the indisputable observation the Second Circuit made in *Herring v. Meachum*, 11 F.3d 374, 377 (2nd Cir. 1993), *cert. denied* ___ U.S. ___, 114 S.Ct. 1629 (1994), that "juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one." *Id., quoting United States v. Werner*, 620 F.2d 922 (2nd Cir. 1980).

The federal courts, however, have upheld convictions in cases where joinder was effected despite the absence of cross-admissibility where the trial court took meaningful affirmative steps to insure that there was neither cross-consideration of the evidence nor a conviction based solely on character, by giving explicit instructions on the issue. *See United States v. VonWillie*, 59 F.3d 922, 931 (9th Cir. 1995); *Herring v. Meachum, supra*, 11 F.3d at 378. Accordingly, the Court of Appeals in this case was "mindful that prejudice generally does not arise

[5] Conversely, when the evidence is cross-admissible, there can be no question of improper joinder. *United States v. Disla*, 805 F.2d 1340, 1353 (9th Cir. 1986); *United States v. Irvine*, 756 F.2d 708, 712 (9th Cir. 1985).

from joinder when the evidence of each crime is simple and distinct, even in the absence of cross-admissibility," noting that "[t]his determination hinges on the assumption that, if properly instructed, a jury can compartmentalize the evidence, rather than considering it cumulatively . . . ." *Id.*

In this case, however, there can be no doubt that the fundamental unfairness required for reversal was present. First, it is clear that the jury was not likely to have compartmentalized the evidence of the two crimes in light of the trial court's holding of cross-admissibility, which permitted the prosecutor to argue repeatedly that the two cases reflected Bean's "modus operandi," and urged the jury to consider facts from the Schatz case to bolster the thin evidence presented in the Fox case. App. A, at 21, 23.

Neither did the trial court take any steps to diminish the prejudice to which Bean was exposed.[6] While that court generally instructed the jury of its duty to decide each count separately, Petition, at 14, such an instruction did not in any way limit the jury's consideration of the evidence, but merely required the jury to determine explicitly guilt or innocence of each charge. This is in contrast to curative instructions that have been found sufficient to overcome prejudice of joinder. *See e.g., Herring v. Meachum, supra*, 11 F.3d at 378 (jury instructed "that evidence of one murder was not to be used to determine petitioner's guilt with respect to the other."); *see also, United States v. VonWillie, supra*, 49 F.3d at 930 (government agreed not to

[6] This failure is not, of course, surprising, in light of the trial court's erroneous determination that the evidence was cross-admissible.

focus on defendant's prior felony conviction beyond that required by defendant's reference to the issue and the court gave limiting instructions both when the potentially prejudicial evidence was admitted and when the jury was ultimately charged).

As the Ninth Circuit noted in deciding the instant matter, the trial court not only failed to instruct the jury that it could not consider evidence regarding one set of offenses as evidence of the commission of the others, any such admonition would have conflicted with the trial court's earlier conclusion of similarity as well as the prosecutor's repeated "modus operandi" arguments. App. A, at 23-24. *See also United States v. Lewis*, *supra*, 787 F.2d at 1322.

Finally, the State fails to mention that it conceded the absence of cross-admissibility, the lack of a common modus operandi, and the possible prejudicial effect of the joinder in argument before the Court of Appeals. App. A, at 26. Thus, as the Court of Appeals noted, the State's argument is the equivalent of arguing that joinder can never constitute a constitutional threat and is proper in all cases based solely on convenience! *Id.*

In light of the foregoing, certiorari should be denied on this issue both because it does not meet the criteria for that remedy and because any grant of the Writ would be futile and wasteful of the Court's limited resources in light of the record below.

## II.

## THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S HOLDING THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE WAS BASED ON DETAILED FACTUAL FINDINGS OF THE LOWER COURT AND ON WELL ESTABLISHED LEGAL PRINCIPLES

During an eight-day evidentiary hearing, Bean established that his two trial counsel rendered ineffective assistance at the penalty phase of his capital trial. Bean showed that his lawyers failed to undertake any meaningful investigation of his background, and that their extremely cursory presentation of lay witnesses was devoid of mitigating substance. In addition, Bean demonstrated that the testimony of his two mental health experts was limited, inconsistent, and poorly presented, and it was marred by lack of adequate preparation and the failure to obtain relevant facts concerning Bean's childhood and background. Because of counsel's inadequate performance, the jury which sentenced Bean to death was never informed of his abusive and deprived childhood, that he resorted to drugs to cope with his traumatic upbringing and mental health symptoms, or that he had a remarkably tragic family history replete with mental illness, poverty, substance abuse and domestic violence.

The magistrate judge issued detailed factual findings, and recommended that the district court grant habeas relief as to Bean's death sentence. The magistrate judge found that trial counsel had rendered ineffective assistance at the penalty phase by failing adequately to investigate and to present a case in mitigation. App. A, at 10. The

district court upheld the magistrate judge's findings and entered judgment vacating Bean's death sentence. *Id.* at 11.

The Court of Appeals agreed with the lower court, stating that "Bean's penalty-phase defense was disorganized and cursory" and that "[t]he two attorneys' confusion over their respective roles exacerbated deficiencies in the development of mitigating evidence." App. A, at 12. As the Court of Appeals acknowledged, counsel failed to follow the recommendations of mental health experts for testing until the weekend immediately preceding the penalty phase. Thus, Bean's counsel were unaware of the results of that testing when the penalty phase began. *Id.* at 13. Bean's counsel also failed to furnish other necessary information requested by the experts and failed to prepare them adequately to testify. "In sum, the penalty phase defense was at best woefully ineffective; at worst deleterious." App. A, at 13.

The State contends that the Court of Appeals employed a "new test" for reviewing the constitutional competency of counsel thereby requiring the State to show "flawless" performance of counsel to pass constitutional muster. Petition, at 15. It is clear from a review of the Court of Appeals' opinion, which, as discussed above, affirmed the well-considered findings of a magistrate judge who conducted an evidentiary hearing and a district court judge who upheld those findings, that it has found counsel ineffective under the well-established standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which is cited on pages 12, 15, 16, 17 and 18 of the Court of Appeals' decision.[7]

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[7] Notably, the Court of Appeals did not find ineffective assistance at the guilt phase despite counsel's failure to investigate potential defenses and to interview key witnesses. App. A, at 18-20. If the Ninth Circuit was indeed adopting

*(footnote continued on next page)*

Actually it is the State that is arguing for a new standard to analyze ineffective assistance claims, contending that counsel was not constitutionally deficient because although flawed, their performance was not a "total absence of advocacy" amounting to no representation at all. Petition, at 19, *citing Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir. 1995). In any event, the performance of counsel was more than merely flawed. According to the magistrate judge, (1) the pretrial investigation into Bean's background was "sketchy," "superficial," and "inadequately developed for purposes of the penalty phase," F&R, at 59, 60; (2) there was a lack of follow up to important requests medical experts made of trial counsel, F&R, at 58; (3) there was confusion as to the defense attorneys' roles in the penalty phase, F&R, at 58; (4) the penalty phase consisted of a themeless presentation, F&R, at 58; (5) the defense presented "very limited family/friends testimony" the purpose of which was "not apparent," F&R, at 61; (6) expert testimony presented by the defense was minimal, unpersuasive and an undeveloped "patch job," F&R, at 62, 68; and (7) closing arguments by both defense counsel were contradictory, did not have "much to say," and were "seriously hobbled by the lack of directed evidence put on in the penalty phase." F&R, at 58, 63. In sum, "from the preparation stage, through the presentation, to the closing, [Bean] did not receive effective assistance of counsel." F&R, at 63.

The district court agreed, finding the failure to prepare for the penalty phase until the guilt phase was over, combined with confusion

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a new test that required a flawless performance from counsel, the Court would have found ineffective assistance at the guilt phase as well.

over the respective roles of the two attorneys appointed to represent Bean and the lack of a minimally adequate investigation into Bean's background, resulted in an abysmally superficial presentation in which defense counsel conceded in his opening statement that "the evidence that we will present . . . won't be very much," RT 4310, and concluded in his closing argument "I don't have a lot of good factors that you can relate to." RT 4738; Judgment and Order, July 22, 1997.

The State next argues that the Court of Appeals failed to give due deference to the California Supreme Court's appellate decision on ineffective assistance of counsel. Petition, at 16. The State seriously misrepresents the state court record in citing to the California Supreme Court's opinion on direct appeal and stating that the court was "ultimately satisfied that trial counsels' performance met the constitutional standard . . . ." Petition, at 16. Even to assert this argument required the State to manufacture factual findings and to take language in the California Supreme Court opinion on direct appeal completely out of context.

On direct appeal, Bean raised a record-based claim that trial counsel was ineffective for failing to investigate a mental state defense at the guilt phase. The California Supreme Court denied the claim because the trial record was insufficient to prove Bean's claim. In so doing, the court held that the trial record neither confirms defendant's assertion that counsel failed to investigate or consider such a defense, nor did it suggest what evidence might have been obtained had counsel undertaken further cross-examination of witnesses. *People v. Bean, supra*, 46 Cal.3d at 944. The court advised, given that the scope of the appeal is limited to the trial record, that an appellant who claims to have

been denied constitutionally adequate assistance may seek relief through a collateral attack on the judgment where matters outside the record can be referenced. *Id.* Nothing in the California Supreme Court's opinion pertains to penalty phase ineffective assistance, and even if it did, it would have minimal relevance since none of the facts established at the federal evidentiary hearing in support of Bean's claim were before the court on direct appeal. The California Supreme Court denied Bean's penalty phase ineffective assistance claim, raised in the subsequently filed habeas corpus petition, on the merits, without a hearing or the issuance of an opinion. Contrary to the State's grossly misleading assertion, there are simply no factual findings to which to defer.

The State cites the testimony of the two mental health experts, Dr. Weissman and Dr. Blunt, who testified on Bean's behalf at the penalty phase, in support of its contention that counsel's performance was constitutionally adequate. Petition, at 16-17. On the contrary, despite "abundant" mental state evidence presented at the evidentiary hearing which established that Bean was "functionally mentally retarded; that he suffered from post-traumatic stress disorder, 'based upon his childhood experiences; that he was brain-damaged . . .," App. A, at 14, Bean's mental health experts provided equivocal and contradictory testimony at trial. The State's summary of the mental state evidence masks how disorganized, poorly presented and ultimately meaningless this testimony was.

Counsel failed to prepare Dr. Weissman to testify and failed to provide him with records that he requested. As a result, he "could not definitively opine whether Bean had suffered from brain damage and whether Bean was able to appreciate the criminality of his conduct, but

could merely testify that Bean suffered from an organic personality disorder and was moderately defective in intelligence." *Id.* at 13. He testified that "he could not be certain of [Bean's] problems without further development. *Id.* at 17. Dr. Blunt, who testified on the basis of her last-minute neuropsychological testing without having reviewed any records or facts about the case, testified that Bean had moderate brain damage. However, as the magistrate judge concluded, "[h]er testimony was less than persuasive at best given this context, and a seeming artifice at worst." App. A, at 17.

The mental state testimony at trial was further compromised by counsel's incomprehensible failure to question Dr. Weissman about his consideration of Dr. Blunt's findings of brain damage. Counsel elicited testimony from Dr. Weissman that after examining Bean he reached a "clinical impression that suggested that he should be further examined ... for organic brain damage" but reached "no firm conclusion." RT 4547. Counsel did not, however, ask Dr. Weissman whether he had reviewed Dr. Blunt's findings that Bean suffered from brain damage, which would have solidified his findings of "soft signs" of brain damage, RT 4548, 4550, while, at the same time, corroborating Dr. Blunt's testimony. On cross examination, Dr. Weissman testified that, in fact, he had reviewed Dr. Blunt's report the day before he testified, RT 4570, and endorsed her findings of brain damage which were corroborative of his own. RT 4603. Because counsel failed to ask appropriate questions of Dr. Weissman on direct examination regarding his consideration of Dr. Blunt's findings, however, the prosecutor was able to undermine Dr. Weissman's ultimate conclusion that Bean suffered from brain damage during cross-examination. Dr. Weissman was forced to back off his

consideration of Dr. Blunt's report, since he had not indicated his reliance upon it when questioned by defense counsel, and ultimately he conceded that Bean's condition was "suggestive" only of organic brain damage. RT 4605.

This permitted the prosecutor to state in his closing argument that the evidence "falls short" of proving brain damage in that "Dr. Weissman, even after having the benefit of Dr. Blunt's findings, was finally, after much going back and forth, of the opinion that he had no opinion concerning Mr. Bean having organic brain damage. The best he could suggest was some soft signs of it, which he did not take pains to develop any further." RT 4722. Thus, the prosecutor pointed to a "disagreement" between Bean's two experts, and was able to obtain a jury instruction regarding resolution of conflicting expert testimony even though the only experts were defense experts. CT 1000.[8]

In addition, although Dr. Weissman testified that he could not render a credible opinion about Bean's mental state at the time of the crime in the absence of information about the crime, Dr. Blunt inexplicably said that she could, and testified that Bean was definitely impaired in his ability to appreciate the criminality of his conduct. *Id.* This created a further conflict between Bean's experts and permitted the prosecution to undermine the entirety of Dr. Blunt's testimony, RT 4668-4675, and to stress her lack of experience. RT 4722-25.

As the Court of Appeals concluded, "[t]hese two witnesses 'did

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[8] At the evidentiary hearing, both Dr. Weissman and Dr. Blunt agreed that had they been adequately prepared and provided with readily available information about Bean's social history and testing, they would have opined at trial that Bean had brain damage and was suffering from substantial physical, mental and emotional impairments. App. A, at 14.

little to aid in [Bean's] fight for life.'" App. A, at 17, *quoting Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995), *cert. denied* ___ U.S. ___, 116 S.Ct. 1335 (1996).

The State next argues that certiorari should be granted because this case stands in "marked contrast" to other Ninth Circuit cases in which counsel was found to be ineffective for failing to present any mitigating evidence. Petition, at 17-19. In those cases, the State argues, relief was granted where no investigation was done and no mitigation was presented. Of course, certiorari is not an appropriate vehicle for resolving intra-Circuit conflicts. *See* United States Supreme Court Rule 10.

In any event, the State misreads Ninth Circuit authority. While the Ninth Circuit has certainly granted relief in cases where no investigation was done by counsel at the penalty phase and no mitigating evidence was presented, it is not true that only in such cases has ineffective assistance been found. For example, in *Hendricks v. Calderon, supra*, counsel presented the testimony of a clinical psychologist, the defendant, and another lay witness. Despite this presentation, counsel was found to be ineffective because the psychological testimony was not corroborated, the evidence presented was not connected to statutory mitigating factors, and counsel failed to discover and to present evidence regarding Hendricks' background of physical and sexual abuse. Id. at 1043-44. *Cf. Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), *cert. denied* ___ U.S. ___, 118 S.Ct. 1856 (1998)(relief granted where trial counsel hired a psychiatric expert only days before trial to support his insanity defense and failed to provide expert with readily available information: "when the defense's only



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expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.").[9]

Next, the State argues that counsel and his investigator performed an adequate investigation by contacting various family members and friends but that these potential witnesses failed to disclose evidence of Bean's drug addiction, severely abusive upbringing and general inability to cope. Petition, at 19. The State thus attempts to blame Bean and Bean's family and friends for not disclosing evidence "that would have been helpful in developing a mental health profile." Petition, at 19. However, it was not that the people interviewed hid this information--they were never asked. As the State stipulated prior to the evidentiary hearing, "trial counsel did not seek or obtain information with regard to [Bean's] family history of mental illness, substance abuse, domestic violence and poverty," "did not seek or obtain information with regard to the psychological and physical abuse suffered by [Bean]," and "did not explicitly instruct his investigator to obtain mitigating evidence concerning whether [Bean] was physically, sexually or psychologically abused as a child, whether there was a family history of mental illness, poverty or deprivation, the extent and origin of [Bean's] mental impairments and learning deficits, and the basis for any substance abuse problems." Joint Pretrial Statement, Undisputed Facts.

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[9] The State's contention that this case is an aberration is further undermined by the fact that not one Ninth Circuit judge called for a vote to have the case reheard en banc. App. B.



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Moreover, as the district court held:

> Because the initial family and friends interviews were sketchy, they were insufficient to excuse counsel's failure to interview other persons. Not only was the scope of the interviews inadequately designed to elicit relevant mitigating information concerning [Bean]'s family history, but the persons interviewed ([Bean's] father, mother and sister) were those most likely to withhold such information.

Judgment and Order, July 22, 1997, at 5.

With regard to Bean's failure to disclose his abusive upbringing and other pertinent facts about his background, as all of the mental health experts, including those offered by the State, testified at the evidentiary hearing that minimization of one's drug use and denial of a traumatic childhood are extremely common, and a proper evaluation would not rely on the client for background information or substance abuse history. Nor is it reasonable to expect someone with the cognitive and communication deficits Bean indisputably suffered to have an awareness of or the capacity to articulate his impairments and brain damage or to recognize that such information was relevant to his trial.

Moreover, there was information readily available to defense counsel, including Bean's juvenile records, which, as the magistrate judge found, "would have spoken much about [Bean's] troubled childhood, and which would have supplied many leads for further investigation, [but] were not reviewed until after the guilt phase." F&R at 60. In addition, in trial counsel's investigator's interview of Joseph Boykin, a family friend, Mr. Boykin said that Bean's father "had been quite rough on Defendant in the past, and at one time may have been arrested for beating the Defendant." Evidentiary Hearing Exhibit 145. Such a significant revelation would have led competent counsel to

question others regarding child abuse and to present such evidence at trial. Here, the information was ignored. Finally, there was overwhelming evidence of Bean's drug use, both chronic and at the time of the crimes, that was readily available to trial counsel, and which, as is undisputed, trial counsel failed to investigate or pursue. Thus, despite counsel's cursory investigation, the defense did obtain rich clues to potential mitigating evidence, but counsel's inattention to the penalty phase led them to neglect those critical facts.

The State argues that even if counsel's performance were deficient, Bean failed to establish prejudice. It contends that while the jury did not hear graphic details of Bean's childhood, they were aware that he "spent time in juvenile detention, was beaten by his parents, and left home at 15." Petition, at 20. First, it is simply not true that the jury heard evidence that Bean was physically abused by his parents. To the contrary, despite readily available evidence that Bean was brutally beaten by his father on a regular basis, counsel elicited testimony from family and neighbors that Bean had a good relationship with his parents, and Bean's father gave unrebutted testimony that he never beat Bean. As the Ninth Circuit correctly stated, "[t]he jury that committed Bean to death had no knowledge of the indisputably sadistic treatment Bean received as a child, including repeated beatings that left a permanent indentation in his head." App. A, at 17.

Furthermore, the fact that Bean was placed in juvenile detention or left home at 15 years of age, particularly when there was no explanation of his background to explain and put in context why these events occurred, did not constitute mitigating evidence. Thus, Bean's mother testified that Bean had been made a ward of the juvenile court,

and had been sent to Boys' Ranch, RT 4353, but counsel was not aware, and therefore did not establish, that Bean was sent to juvenile facilities for stealing his father's guns because his father had threatened Bean and his siblings with them. Evidentiary Hearing Exhibit 62.

Similarly, while counsel elicited testimony from Bean's parents that Bean left home at the age of fifteen, RT 4353-54, because according to Bean's father, "he didn't want to do what I told him to do," RT 4373, counsel never presented testimony that the actual reason for leaving home was to avoid the violence visited upon him by his father. Having elicited such false and damaging testimony that Bean's father never beat Bean and that Bean was simply a recalcitrant and unruly child, it was particularly unreasonable and incompetent for counsel to fail to rebut such testimony. Because of counsel's failure to investigate Bean's childhood, he did not know of the readily available evidence of the brutal beatings Bean endured or that Bean fled his father's house to escape the brutality.

In addition, as discussed above, while two mental health experts testified at the penalty phase, "the experts' lack of preparation and the limited foundation for their conclusions severely limited their utility to Bean's penalty-phase defense." App. A at 16-17. Counsel's deficient performance was undoubtedly prejudicial in light of the fact that there was a substantial amount of readily available mitigating evidence that was not presented to the jury at any stage of the proceedings. Such evidence "has the potential to totally change the evidentiary picture." *Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) *quoting Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988)). By contrast, the aggravating evidence presented by the prosecution was

minimal -- consisting of a 1979 burglary conviction and an altercation with two men in which Bean allegedly fired a sawed-off shotgun. *See* App. A, at 17.

That this was a close case is evidenced by the fact that the jury foreman notified the judge after two days of penalty phase deliberations that the jury was hopelessly deadlocked as to both murders and unable to reach a verdict. RT 4796; 4802. After being assured by the jury foreman that he held the opinion that the deadlock was hopeless, the court nonetheless sent the jurors home for the weekend, directing them to return to deliberations on the next Monday morning. RT 4802. The jury ultimately returned a death verdict for the Schatz murder and a life without parole verdict for the Fox murder.

The State argues that counsel's performance was not prejudicial in light of the disparate penalty jury verdicts as to the two murders. Petition, at 20. According to this reasoning, because the jury found death for only one of the murders, Bean was not prejudiced since a truly deficient performance would have resulted in two death verdicts. However, the very fact that the jury voted for life without parole as to one of the murders and was, in fact, deadlocked as to both murders for a period of time, despite the lack of compelling mitigation, demonstrates the closeness of the case and establishes that had counsel performed adequately it is reasonably probable that the outcome would have been different.

## III.

## THE CLAIMS UPON WHICH THE COURT OF APPEALS GRANTED RELIEF WERE NOT PROCEDURALLY DEFAULTED

The State contends that the claim upon which the district court granted relief, ineffective assistance of counsel, was procedurally barred and that a "manifest injustice" has resulted from the Ninth Circuit's refusal to honor the procedural bar. This Court has already denied certiorari on this issue in this case when the State sought review after Court of Appeals' denial of its petition for writ of mandate. *Calderon v. U.S. District Court for the Eastern District of California, supra.*[10] It should do so again.

In any event, Bean's ineffective assistance of counsel claim was not procedurally barred, but was considered on its merits by the California Supreme Court under an exception to California's timeliness default rules. The California Supreme Court, in its order denying the habeas petition, stated that it considered and rejected certain claims, including ineffective assistance of counsel (state claim XLIX), on the merits. Appendix C. In denying these claims, the California Supreme Court order cited specifically to pages 797-798 of its decision in *In re Clark*, 5 Cal.4th 750, *supra*. *Clark* purported to modify and clarify

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[10] The Ninth Circuit Court of Appeals' decision denying mandamus fully analyzed Petitioner's claims regarding the meaning and effect of California's procedural bars only because it was not yet clear at that stage of the litigation whether Bean would prevail on claims the California Supreme Court purported to default. On Appeal, the Ninth Circuit again rejected the State's contentions, relying on the law of the case. App. A, at 12. Since Bean prevailed only on non-defaulted claims, the issue should not even have been raised in this Petition.

various state procedural default rules. Pages 797-98 of the *Clark* opinion pertain to "exceptions to the procedural bar against successive or untimely petitions." *Id.* The Court stated that the "fundamental miscarriage of justice" exception to procedural bar is applied where the habeas petition alleges:

> (1) that the error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [footnote omitted] (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; [footnote omitted] (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [footnote omitted] (4) that the petitioner was convicted or sentenced under an invalid statute.

*Id.*

It is abundantly clear from the California Supreme Court's citation to the exceptions enumerated in *Clark* when it denied the ineffective assistance of counsel claim on the merits, that whether or not the court determined that the petition was untimely, it applied its "miscarriage of justice" exception so as not to preclude review of Bean's ineffective assistance claim. The State's contention that this claim is procedurally barred is wholly meritless.

## CONCLUSION

For the foregoing reasons, Respondent Anthony Cornell Bean respectfully requests that this Petition for Writ of Certiorari be denied.

Dated: June 29, 1999

Respectfully submitted,

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